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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 461

WILLIAM GREENOUGH AND GEORGE HENRY WARREN, JR., TRUSTEES, APPELLANTS,

vs.

TAX ASSESSORS OF THE CITY OF NEWPORT; AND EDWARD L. LEAHY, TAX ADMINISTRATOR OF THE STATE OF RHODE ISLAND

APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF NEWPORT, STATE OF RHODE ISLAND

FILED SEPTEMBER 4, 1946.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 15, 1946.

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[fol. 1]

IN SUPERIOR COURT OF NEWPORT COUNTY

M. P. No. 2929

WILLIAM GREENOUGH et al., Trustees,

v.

TAX ASSESSORS OF THE CITY OF NEWPORT

PETITION FOR RELIEF FROM TAX ASSESSMENT—Filed November 9, 1944

Respectfully represent William Greenough of the City and County and State of New York and George Henry Warren, Jr. of the City and County of Newport and State of Rhode Island, in their capacity of trustees under Clauses Fifth and Sixth of the will of George Henry Warren, late of said City of New York, that they, as such trustees, are aggrieved by the assessment upon intangible property held by them as trustees aforesaid, as shown by the tax assessment made by the Board of Tax Assessors of the City of Newport, bearing date September 15, 1944, and filed in the office of the City Clerk of said City of Newport, and now, within three months of the time appointed for the payment of said tax, said trustees file this petiton for relief from such assessment, and further represent as follows:

1. That George Henry Warren, late a resident of the City, County and State of New York, died on the 3rd day of June, A. D. 1943, leaving a last will and testament dated April 19, 1943, and which, by a decree of the Surrogate's [fol. 2] Court of the County of New York, entered on the 30th day of June, 1943, was duly admitted to probate, and letters testamentary thereon were issued to your petitioners, the executors named therein; and by a decree of the Probate Court of the City of Newport, in the County of Newport and State of Rhode Island, entered on the 15th day of November, A. D. 1943, a copy of said will authenticated under the act of Congress was ordered filed and recorded, and letters testamentary in Rhode Island were issued to your petitioners, the executors named therein.

2. That said will provided in Clauses Fifth and Sixth in part as follows:

"I give and bequeath unto my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the sum of Four Hundred Thousand Dollars in trust nevertheless to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my daughter Constance Whitney Warren for and during her natural life and upon and after her decease or in the ~~event~~ my said daughter shall die before me then to assign transfer and pay over the said principal sum of Four Hundred Thousand Dollars so held in trust for her as aforesaid or the securities in which the same may then be invested and I give and bequeath the same unto her then living children in equal shares and unto the issue of any child of hers who may have previously died leaving issue then surviving such issue however to take the part or share which his her or their parent would have taken if living per stirpes and ~~not~~ per capita.

"In the event however there shall be no child or children or issue of a deceased child or children of my said daughter then surviving then to hold and continue to hold the said sum of Four hundred thousand dollars upon the further trust to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my son George Henry Warren junior during his natural life [fol. 3] and upon and after his decease then to assign transfer and pay over the said principal sum of Four hundred thousand dollars or the securities in which the same may then be invested and I give and bequeath the same unto his issue per stirpes and not per capita."

"Sixth: * * * I do likewise give and bequeath to my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the further sum of Two hundred thousand dollars in augmentation of and to be added to the

principal of the trust created by the fifth clause of this my will for the benefit of my daughter Constance Whitney Warren to be held and disposed of by them upon the same terms and conditions as set forth in said fifth clause."

3. That William Greenough, one of the trustees appointed in and duly qualified as such under said Clauses Fifth and Sixth respectively, is a resident of the State of New York, George Henry Warren, Jr., the other trustee named therein and duly qualified as such is a resident of said City of Newport; that Constance Whitney Warren, the beneficiary for life under said trust is a resident of the State of New York; and that all of the intangible personal property constituting the principal of said trust fund was, at the time of the death of said George Henry Warren, and on the 15th day of June, 1944, at 12 o'clock noon, and at all times since the death of said George Henry Warren was and is now located in the City, County and State of New York and never has been located in the City of Newport in the State of Rhode Island, and is and always has been b-yond the jurisdiction of the State of Rhode Island and has not received or enjoyed any benefit or protection from the laws of the State of Rhode Island.

4. That the tax assessors of said City of Newport in pursuance of an ordinance passed by the Representative Council thereof authorizing the assessment and collection of a tax [fol. 4] on the ratable real estate, tangible personalty and intangible personalty in said City of Newport proceeded to assess said tax and filed its tax roll as aforesaid, wherein there was assessed the following tax:

> Warren, George H. Jr. Trustee UW of George H. Warren for Constance Whitney Warren, Intangible Personal Property $12,500. Tax $50.

and which said tax was assessed upon the intangible personal property held in trust by your petitioners as trustees aforesaid on June 15, 1944, for the benefit of said Constance Whitney Warren of said State of New York described in Paragraph 2 hereof and which said intangible personalty on said June 15, 1944, was located in the said City of New York.

5. That on the 30th day of September, 1944, your petitioners paid said tax under protest.

6. That the assessment of said tax against said George Henry Warren, Jr. Trustee under the will of George Henry Warren is illegal, unconstitutional and void:

(1) Because the fund constituting the intangible personal property upon which said tax was assessed was owned by a non-resident testator and was, on the 15th day of June, 1944, located in the State of New York and was never in the State of Rhode Island.

(2) Because, in addition thereto, the beneficiary for life of the aforesaid trust fund and one of the trustees are residents of the City of New York.

(3) Because the trustees of said trust fund hold said trust fund, so located in the State of New York, as joint tenants, and their title and interest in said fund as such joint tenants are not severable or divisible for the purposes of taxation or otherwise, and their powers must be exercised [fol. 5] as a unit.

(4) Because George Henry Warren, Jr., as an individual resident in Rhode Island, does not, as trustee, exercise his powers as trustee in Rhode Island, nor does he, as trustee, enjoy any profits or protection from the laws of Rhode Island.

(5) Because said trust fund upon which said tax was assessed is, under the laws of the State of New York, subject to the payment of the New York income tax, and the taxation of said fund as intangible personal property in the State of Rhode Island subjects said fund to double taxation.

(6) Because the provisions of subsection Fifth of Section 9 of Chapter 30 of the General Laws of 1938, and any tax levied against the petitioners as aforesaid thereunder, or under any other provision of law in the circumstances and under the conditions aforesaid is unconstitutional and in violation of Article XIV of the Amendments of the Constitution of the United States providing that no state "shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction equal protection of the law."

(7) Because the provisions of Subsection Fifth of Section 9 of Chapter 30 of the General Laws of 1938, and any tax levied against the petitioners as aforesaid thereunder or

under any provisions of law in the circumstances and under the conditions aforesaid, is unconstitutional and in violation of the provisions of Section 16 of Article I of the Constitution of the State of Rhode Island, providing that private property shall not be taken for public uses without just compensation.

[fol. 6] 7. That by reason of the above, your petitioners are entitled to recover from the City of Newport the said tax paid by them as aforesaid:

Wherefore your Petitioners pray:

(1) That judgment be given that said tax is illegal, unconstitutional and void.

(2) That judgment be given to the petitioners for the amount of the tax with penalty thereon so paid by them as aforesaid, together with interest thereon from the date of payment, together with their costs.

(3) That the members of the Board of Tax Assessors of the City of Newport who assessed said tax were John B. Sullivan, Albert C. Landers and James E. Blake, the latter now deceased, and your petitioners pray that service of process may issue according to law against said John B. Sullivan and Albert C. Landers, the surviving members of said Board.

(S.) William Greenough, George Henry Warren, Jr., Trustees u/w George Henry Warren.

[fol. 7] In Superior Court of Newport County

Order for Notice—Filed November 17, 1944

In the above entitled cause, in which the validity of a tax assessment is in question, it is hereby ordered that notice of the pendency of the above proceeding be given to the Director of the Department of Co-ordination and Finance, by leaving at the office of said Director, State House, in Providence, with said Director or someone there employed, a certified copy of this order so that said Director may appear and be heard with reference thereto if he shall see fit.

Entered as a decree of the Court this 17th day of November, A. D. 1944.

(S.) John H. Greene, Jr., Clerk.

Nove. 17, 1944. Enter: (S.) Curran, J.

[fol. 8] PROVIDENCE SC.

In Providence in said county. I have this 30th day of November, A. D. 1944 left a certified copy of the within Order at the office of Department of Coordination and Finance, in the hands and possession of a clerk there employed, within my precinct.

(S.) Vincent J. Berarducci, Jr., Deputy Sheriff.

[fol. 9] IN SUPERIOR COURT OF NEWPORT COUNTY

DEMURRER TO PETITION FOR RELIEF FROM TAX ASSESSMENT—

Filed December 13, 1944

Now comes the defendants in the above entitled cause and demur to the plaintiffs' petition, and for causes of demurrer say:

1. That William Greenough, Trustee, one of the petitioners is not and cannot be aggrieved by a tax assessed against him as trustee, because it is shown in paragraph 4 of the petition that the assessment complained of is against George Henry Warren, Jr., Trustee, and that William Greenough is not assessed.

2. That, therefore, said William Greenough, Trustee, is not a "person aggrieved on any ground whatsoever by any assessment of taxes against him" (Ch. 31, Sec. 14, G. L. 1938), and that he is improperly joined as a petitioner.

3. That said petition is otherwise vague, uncertain, indefinite and insufficient in law.

Wherefore and for divers other good causes of demurrer appearing in said petition these defendants do demur to said petition and to all matters and things therein contained and pray the judgment of this Honorable Court whether they shall be compelled to make any further or

other plea or answer to said petition, and humbly pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

By their attorney,

(S.) John C. Burke, City Solicitor, Attorney for Respondents.

And the respondents hereby reserve the right to file further demurrers and/or pleas to said petition.

By their attorney,

(S.) John C. Burke, City Solicitor, Attorney for Respondents.

[fol. 10] ORDER OVERRULING DEMURRER

There appears on the jacket of the case the following entry:

December 15, 1944.

Hearing on demurrer. Demurrer overruled.

[fol. 11] IN SUPERIOR COURT OF NEWPORT COUNTY

MOTION TO STRIKE OUT WILLIAM GREENOUGH, TRUSTEE, AS ONE OF THE PETITIONERS—Filed December 20 1944

Now comes the defendants in the above entitled cause and move that William Greenough be stricken out as one of the petitioners in the above entitled cause, and for reasons allege:

1. That there is a misjoinder of parties in that William Greenough is not a proper party to said action and should be stricken out as one of the parties.

2. That William Greenough, Trustee, one of the petitioners is not and cannot be aggrieved by a tax assessed against him as trustee, because it is shown in paragraph 4 of the petition that the assessment complained of is against George Henry Warren, Jr., Trustee, and that William Greenough is not assessed.

3. That said William Greenough, Trustee, is not a "person aggrieved on any ground whatsoever by any assess-

ment of taxes against him" (Ch. 31, Sec. 14, G. L. 1938), and that he is improperly joined as a petitioner.

By their attorney,

(S.) John C. Burke, City Solicitor, Attorney for Respondents.

[fol. 12] IN SUPERIOR COURT OF NEWPORT COUNTY

RESCRIPT—Filed February 21, 1945

SULLIVAN, *J.*

Heard on Respondent's motion to strike out the name of William B. Greenough as one of the petitioners, because of misjoinder of parties; that said Greenough is not aggrieved by any tax assessed against him, as trustee, because the assessment is against George Henry Warren, Jr., trustee, and that said Greenough is not assessed; and that said William B. Greenough, trustee, is not a "person aggrieved on any ground whatsoever by any assessment of taxes against him", Ch. 31, Sec. 14, General Laws 1938, and that he is improperly joined as a petitioner.

The facts in this motion are not in dispute. The Chairman of the Board of Tax Assessors testified as to the imposition of a tax against George Henry Warren, Jr., a resident of Newport, R. I., under the will of George Henry Warren, Sr., who died a resident of New York, on intangibles for the benefit of Constance Whitney Warren, on one-half of the property held in trust. The assessment was made by virtue of Subsection 5 of Section 9, Chapter 30, General Laws, 1938. The trust estate of $25,000 was held jointly [fol. 13] by said Warren and by said Greenough, a resident of the State of New York. The tax of $50 was paid under protest by the trustees, which they seek to recover back by virtue of Section 14 of Chapter 31, General Laws 1938, on the ground that the assessment was illegal, void and unconstitutional.

Section 14 of Chapter 31, General Laws 1938, which gives to "any person aggrieved on any ground whatsoever by any assessment of taxes against him" etc. is a remedial statute and must be liberally construed. See cases under Workmen's Compensation Act, Vols. 54, 61 and 65 R. I. There can be no question but that the tax is assessed against the fund. This was so held in Clarke vs. Addelman, 26 R. I.

168. Section 4 of Chapter 486, General Laws, vests in co-trustees "title to all of the trust estate". See Edwards vs. Cardarelli, 65 R. I. 236, where the Court said: "A guardian, unlike a trustee * * * does not take legal title to his ward's personal property". Here, Warren and Greenough were appointed co-trustees to administer the estate in question; and in the case of Angel vs. Moni, 45 R. I. 186, it was held that "any action depending on the exercise of judgment or discretion on the part of the trustees requires the joint action of all". See Kramme v. Newshaw, 147 Md. 535, 128 Atl. 468. Also, Donovan vs. Miller, 112 At. 926 (Md.)

Now under the well-established principles of law concerning the assessment of taxes being against the fund, the joint ownership of the legal title of the fund by the trustees, the indivisibility of the rest constituting the estate and the duty of the trustees to act collectively, the only question remaining is whether said Greenough is a party "aggrieved on any ground whatsoever".

[fol. 14] The court in Tillinghast vs. Brown, 24 R. I. 179, a probate appeal, states the rule to be that

> "A party is aggrieved by the judgment or division when it operates on his rights of property or bears directly on his interest".

The word "aggrieved" refers to a substantial grievance, the denial of some personal property right or the imposition upon a party of a burden or obligation.

A party aggrieved is one whose pecuniary interest is directly affected by the decree; one whose right of property may be established or divested by the decree; and, quoting from Lawless vs. Regan, 128 Mass. 592:

> "In order to have a right of appeal from the judgment of the Court, it must appear that the party appealing has some pecuniary interest or some personal right which is immediately or remotely affected or concluded by the decree appealed from".

See *Roullard* vs. *McSoley*, 54 R. I. 232, at 234;

R. I. Hospital Trust Co. vs. *Hopkins*, 38 R. I. 59 at 69;

Hamilton Mfg. Co. vs. *City of Lowell*, 274 Mass. 477, 175 N. E. 73.

The Hamilton Manufacturing Co. case is a tax case where the Court held that a person aggrieved "means one whose pecuniary interests are or may be adversely affected."

The respondent contends that to allow said Greenough to continue as a petitioner will tend to becloud the issue, embarrass the respondent and confuse the Court. The Court cannot follow this reasoning against the rights which said Greenough has as a cotrustee of the fund, a part of which is being assessed. Under the provisions of the re- [fol. 15] medial Statute, Section 14 of Chapter 31 of the General Laws, 1938, it would seem to the Court that he falls within the rule of a person "aggrieved". At the most, if his name is allowed to remain as a petitioner, and if he is not entitled to become a party, it is mere surplusage; and if his name is stricken out and he is not entitled to petition the Court for redress under the statute, it is a most serious matter, as he has been denied his constitutional right.

For the above reasons, the motion to strike out is denied.

[fol. 16] In Superior Court of Newport County

Pleas—Filed December 20, 1944

1

The defendants come and defend the wrong and injury, when, etc., and say they are not guilty of the supposed grievances in said petition alleged against them, or any or either of them, in manner and form as the Petitioners have declared against them. And of this the defendants put themselves upon the country, etc.

By their attorney,

(S.) John C. Burke, City Solicitor.

2

And for a further plea in this behalf, the defendants say that the petitioners ought not to have or maintain their action against them, because, they say, that the assessment of said tax against said George H. Warren, Jr., Trustee under the will of George Henry Warren, is not illegal, unconstitutional and/or void. And this the defendants are ready to verify. Wherefore, they pray judgment if the

Petitioners ought to have or maintain their action against them, etc.

By their attorney,

(S.) John C. Burke, City Solicitor.

3

And for a further plea in this behalf, the defendants say that the petitioner and/or petitioners ought not to have or maintain their action against them because, they say, [fol. 17] that the assessment on the intangible personal estate of the petitioner, George H. Warren, Jr., Trustee, was not illegal, unconstitutional and/or in violation of the provisions of Article V of the Amendments of the Constitution of the United States as complained of by the petitioner. And this the defendants are ready to verify. Wherefore, they pray judgment if the Petitioners ought to have or maintain their action against them, etc.

By their attorney,

(S.) John C. Burke, City Solicitor.

4

And for a further plea in this behalf, the defendants say that the petitioner and/or petitioners ought not to have or maintain their action against them because, they say, that the assessment on the intangible personal estate of the petitioner, George H. Warren, Jr., Trustee, was not illegal, unconstitutional and/or in violation of the provisions of Section 16 of Article I of the Constitution of the State of Rhode Island as complained of by the petitioner. And this the defendants are ready to verify. Wherefore, they pray judgment if the Petitioners ought to have or maintain their action against them, etc.

By their attorney,

(S.) John C. Burke, City Solicitor.

And the respondents hereby reserve the right to file further plea or please to said petition.

(S.) John C. Burke, City Solicitor; Attorney for Defendants.

[fol. 18] IN SUPERIOR COURT OF NEWPORT COUNTY

STIPULATION—Filed December 14, 1944

In the above entitled cause, it is hereby agreed that the petitioners have leave to amend their petition by substituting the word Fifth for the word Sixth in line 1 of subsection (6) of paragraph 6 on page 4 of said petition and in line 2 of subsection (7) of paragraph 6 on page 5 of said petition.

(S.) Sheffield & Harvey, Attorneys for Petitioners.
John C. Burke, City Solicitor, Attorney for Respondents.

[fol. 19] IN SUPERIOR COURT OF NEWPORT COUNTY.

SUGGESTION OF QUESTION OF CONSTITUTIONALITY OF AN ACT OF THE GENERAL ASSEMBLY—Filed December 14, 1944

The petitioners in the above entitled cause hereby represent that the constitutionality of an act of the General Assembly is brought in question upon the record of said cause and so far affects the merits of the controversy that it ought to be determined by the Supreme Court before further proceedings; Wherefore they move that said cause be certified to the Supreme Court for its determination thereof.

By their Solicitors,

(S.) Sheffield & Harvey.

ORDER DENYING MOTION TO CERTIFY

December 15, 1944.

Motion to certify papers to Supreme Court denied.

[fol. 20] IN SUPERIOR COURT OF NEWPORT COUNTY

Statement of Evidence

Mr. Harvey: May it please the court, I know Your Honor is somewhat familiar with the nature of this proceeding, but for the purpose of the record I will briefly state that it is a proceeding brought under Section 14 of Chapter 31 of

the General Laws, a petition for relief from taxation made by the Board of Tax Assessors under Sub-section 5 of Section 9 of Chapter 30 of the General Laws.

The tax itself is assessed against George H. Warren junior, trustee under the will of George H. Warren for Constance Whitney Warren, intangible personal property $12,500, tax $50.

The petition recites that George H. Warren senior at the time of his death was a legal resident of the State of New York; that he died and his will was probated before the Surrogate's Court of the County of New York, and that letters testamentary were issued to George H. Warren junior and William Greenough, the executors, and that those two were appointed trustees under Sections 5 and 6 of his will; that William Greenough, one of the trustees, is a resident of New York; that Constance Whitney Warren, a beneficiary for life, is a resident of New York; that a fund constituting $12,500 was on the 15th of June, 1944, and at all times for that matter, in the State of New York [fol. 21] and was never in the State of Rhode Island; that under these conditions and from these facts the taxation of George H. Warren junior against George H. Warren junior as trustee on $12,500 worth of intangible personal property, which constituted on the 15th day of June one-half of the intangible property then held by these trustees in the State of New York is unconstitutional and void and illegal, both under the Constitution of the United States, citing Article 5 of the amendments to the Constitution of the United States, and is also in violation of the Constitution of the State of Rhode Island.

A motion was made to strike out the name of William Greenough, as trustee, which was heard by the Superior Court and denied.

I think that substantially states the essential facts in connection with the testimony which is to be introduced, and I will ask Mr. John B. Sullivan to take the stand.

[fol. 22] JOHN B. SULLIVAN sworn.

By Mr. Harvey:

1 Q. Mr. Sullivan, your full name is John B. Sullivan?
A. Yes, sir.

2 Q. You are chairman of the Board of Tax Assessors of the City of Newport?

A. Yes, sir.

3 Q. And have been for how long?

A. About 18 years.

4 Q. And you were such tax assessor in 1944?

A. I was.

5 Q. Did the tax assessors in their tax assessment roll filed with the City Clerk assess a tax against George H. Warren, trustee under the will of George H. Warren for the benefit of Constance Whitney Warren?

A. Yes, sir.

6 Q. Will you turn to your assessment?

A. Yes, sir.

7 Q. Will you read it?

A. Bill No. 8105. George H. Warren junior, trustee under will of George H. Warren for Constance W. Warren, assessment of $12,500, intangible personal property for year fiscal 1944-45.

8 Q. The amount is $50.

A. Yes.

9 Q. Does that book show whether that was paid?

A. This book would not show it.

[fol. 23] 10 Q. That was a tax assessed upon the intangible property held in trust by Mr. William Greenough and Mr. George Henry Warren junior, was it not?

A. No, sir.

11 Q. Was it not one-half of the property?

A. That property allocatable to George H. Warren junior in the minds of the assessors.

12 Q. It was one-half?

A. It was one-half, yes, sir.

Cross-examination.

By Mr. Burke:

13 Q. You did not assess any tax against Mr. Greenough?

A. No, sir.

14 Q. And as far as you were concerned, and the Board of Assessors, this assessment was made in strict conformity with the statute as you understand it?

A. It was.

Mr. Harvey: I think that is a question of law, Your Honor.

The Court: I think it is harmless. It may stand. Exception.

Petitioner's exception noted.

[fol. 24] Redirect-examination.

By Mr. Harvey:

15 Q. You did tax him as trustee under the will of George Henry Warren senior?

A. That is correct, yes, sir.

16 Q. Under the fifth clause, was it not, or don't you know?

A. Yes, that is correct.

17 Q. That represented one-half, did it not?

A. Yes, sir.

Recross examination.

By Mr. Burke:

18 Q. Mr. Harvey used the word you taxed "Him." You mean you taxed George Henry Warren?

A. Yes.

19 Q. You did not tax Mr. Greenough?

A. No, sir.

Mr. Harvey: That is a matter of law. The tax assessment speaks for itself, anyway.

Mr. Burke: I wanted the record clear.

The Court: The record is clear. Is that what the record shows, Mr. Sullivan, that it was against George H. Warren junior?

Witness: Yes, sir.

By Mr. Harvey:

20 Q. As trustee under the fifth and sixth clauses of the will of George H. Warren?

[fol. 25] A. Our record doesn't show it, but we have a transcript of the probate which does show it. I have it here.

21 Q. On one-half of the intangible personal property?

A. That is correct.

22 Q. Have you a transcript of the probate with you?

A. I have a partial transcript covering the fifth and sixth clauses, or fourth and fifth clauses.

23 Q. Have you it with you?
A. I have a transcript of it.
24 Q. You have really an abstract or summary of the provisions of the fifth clause of the will of George H. Warren?
A. I have.
25 Q. That was on the file at the time you made the assessment, or substantially at that time?
A. It was.
26 Q. And you used that as the basis for the tax against George Henry Warren?
A. In part, yes.

By Mr. Burke:

27 Q. You had other information, did you not?
A. We did.

[fol. 26] JOHN M. DRING sworn.

By Mr. Harvey:

1 Q. What is your full name?
A. John M. Dring.
2 Q. You are clerk of the Probate Court of the city of Newport?
A. That is correct.
3 Q. Have you in response to a subpoena duces tecum issued by this court brought with you the papers in the Probate Court relating to the filing of the will and the recording of the will of George H. Warren senior?
A. I have those papers.
4 Q. And this document I show you is an exemplified copy of the will and proceedings in New York before the Surrogate's Court of New York, showing the original probate of the will of George H. Warren?
A. That is correct.
5 Q. And do you know the date of the probating in New York?
A. I can find it. Admitted on June 26, 1942. That is the decree of Surrogate Delehanty.
6 Q. Was a decree entered by the Probate Court of the city of Newport ordering this filed and recorded?
A. That decree was entered.
7 Q. Have you an original decree there?

A. I have a decree taken from the judge's docket book, which stands as the record in the estate.

8 Q. And this provides, does it not, that after having signed the petition in the usual form the petition was advertised according to law?

[fols. 27-29] A. Yes. That was advertised for three successive weeks.

9 Q. That petition asks that "The undersigned pray that the accompanying authenticated copy of the will of the decedent, which operates on an estate in this city may be filed and recorded in the office of the clerk and that letters testamentary may be issued in Rhode Island to George H. Warren junior and William Greenough of New York," and that is signed by George H. Warren junior and William Greenough, executors?

A. Yes.

10 Q. And the decree reads that it is decreed that said petition be granted upon the giving of a bond of $15,000 without surety and that letters testamentary issue to George H. Warren Junior and William Greenough of the State of New York, in Rhode Island?

A. As executors in Rhode Island.

11 Q. That is signed by you as clerk?

A. Yes.

12 Q. Now, included in this exemplified copy is a copy of the will of George Henry Warren?

A. Yes, there is.

Mr. Harvey: Instead of having that read into the record; I would like to introduce a copy of it here, because I think Mr. Dring would want his papers.

The Court: All right. The copy by consent of counsel may be introduced in lieu of the original.

Copy of will marked "Petitioners' Exhibit 1".

[fol. 30] WILLIAM GREENOUGH.

By Mr. Harvey:

1 Q. Mr. Greenough, your full name is William Greenough?

A. Yes, sir.

2 Q. Where do you reside?

A. At 128 East 56th Street, Borough of Manhattan, New York City.

3 Q. You are resident of New York?

A. I am.

4 Q. And what is your occupation?

A. I am a lawyer.

5 Q. How long have you been a resident of New York and how long have you been a lawyer?

A. Well, I became a resident of New York in 1879. I was admitted to the bar in October, 1899, and I therefore have been a member of the bar for nearly 46 years.

6 Q. By his will George H. Warren appointed you and George H. Warren junior executors and trustees?

A. Yes.

7 Q. You are qualified as such, are you not?

A. In New York under the Surrogate's Court act the Surrogate issues letters testamentary to executors and letters of trusteeship to trustees and you have shown me a copy of letters of trustee-ship issued to George Henry Warren junior and myself by the Surrogate, under the will.

8 Q. That is the original certificate, is it not?

A. No, it is a copy. It is called a certificate of letters [fol. 31] of trusteeship. It is copied from the book which shows the original record under that number.

9 Q. This was dated November 4, 1943?

A. Yes, sir.

10 Q. And whether or not that has ever been revoked?

A. It has not been revoked.

11 Q. Now, did you know George H. Warren senior?

A. I did.

12 Q. How long had you known him before he died?

A. I had known him since I was married in 1907. He was my wife's uncle, and I had known him since 1907.

13 Q. And of what place was he a resident?

A. He was a resident of the State of New York. He was born there and lived there all his life.

14 Q. Was he ever a resident of Rhode Island?

A. He was not.

15 Q. Did you know his daughter, Constance Whitney Warren?

A. I did.

16 Q. How long have you known her?

A. Since 1907, and perhaps before. I knew her before I was married.

17 Q. Was she related to Mrs. Greenough?

A. She was her first cousin.

18 Q. So that you are familiar with the family?
A. I know the family history.
19 Q. Where did she live?
A. She lived with her father in New York.
[fol. 32] 20 Q. Whether or not she was a resident of New York?
A. Yes, she was a resident of New York, at least on June 15, 19—what was the date?
21 Q. 1944?
A. Yes.
22 Q. Was she ever a resident of Rhode Island?
A. No, she was not.
23 Q. You having qualified as trustee, will you tell the court what property, intangible property the trustees under the will of George H. Warren senior held on June 15, 1944?
A. The trust which affected Constance Whitney Warren held 500 shares of the capital stock of Standard Oil Company of New Jersey, which was purchased if I am not mistaken at approximately $50 a share.
24 Q. Where was that located on that day?
A. The certificate was in our safe deposit vault in the Chase National Bank, 115 Broadway, New York.
25 Q. Was any in Rhode Island?
A. It was not in Rhode Island.
26 Q. Did you as one of the trustees pay the tax that was assessed against George H. Warren?
A. Yes, sir. We paid it under protest, or asked you to.
27 Q. Is that the check with which it was paid?
A. Yes, that is the check.
28 Q. I will ask you is this the tax bill?
A. Yes, the receipted tax bill.
[fol. 33] 29 Q. And signed by Agnes Gould?
A. Yes, or somebody for her, I don't know.
30 Q. That shows the payment of a tax on October 2, 1944?
A. Plus a slight penalty, 23 cents.
31 Q. At the top of that tax bill are the words "Paid under protest" stamped?
A. Yes.

Tax bill marked "Petitioner's Exhibit 2."

32 Q. Now, coming to the check, is this the check you used for the payment of that tax?

A. Yes, sir. It is the check signed by George Henry Warren junior and myself. It states in the lower left-hand corner, "Paid under protest." A check for $50.

33 Q. That is made to the order of Agnes Gould, Tax Collector?

A. Yes, sir.

34 Q. And is stamped with "City of Newport City Treasurer" on the back?

A. It appears to have been paid to the City Treasurer by Agnes Gould, Tax Collector, and then collected through the Commercial National Bank & Trust Company of New York.

35 Q. The trustee's account was held in Manufacturer's Trust Company in New York, and who had authority to sign the checks?

A. Only George Henry Warren junior and myself.

36 Q. Did either have authority to sign checks alone? [fol. 34] A., No.

Check marked "Petitioners' Exhibit 3."

Mr. Harvey: I meant to ask Mr. John B. Sullivan to produce the protest which accompanied the check.

The Court: That may form a part of his testimony.

Protest marked "Petitioners' Exhibit 4."

37 Q. Mr. Greenough, as a practicing attorney in the State of New York are you familiar with the tax laws of the State of New York?

A. I am.

38 Q. Will you state whether or not under the laws of the State of New York you and Mr. George H. Warren Junior as trustees are in any way taxable——

Mr. Burke: Objected to, Your Honor.

The Court: Let him finish.

39 Q. —on the property held by you under the fifth and sixth clauses of the will of George H. Warren senior?

A. For the benefit of Constance Whitney Warren.

40 Q. Yes, for the benefit of Constance Whitney Warren.

Mr. Burke: I object, Your Honor. It has no relevancy in this case.

The Court: Is there an allegation they are being taxed on this property for which—the City of Newport has made [fol. 35] an assessment which is unconstitutional?

Mr. Burke: That would come up under a constitutional question.

The Court: It seems to me you have a constitutional question raised here. I think this case should go to the Supreme Court. The court does not desire to shut you off, but the statute as I read it, and the allegation of unconstitutionality in the assessment, the court feels it is of such vital importance to the city of Newport, the financial department of the city of Newport, that this matter should be certified to the Supreme Court for an opinion. There is no use sending it up piecemeal, and neither is there any use in setting it out piecemeal now and asking me to decide the question, when it is alleged in the bill that this assessment is in violation of the State and Federal Constitution and it is double taxation. It seems to the Court it will not do any harm to the Supreme Court to have Mr. Greenough express an opinion as an expert as to the allegation set out in the bill.

Mr. Burke: On the question of constitutionality, that was brought up here some time ago and the motion was denied to have the case certified. I think as far as this court is [fol. 36] concerned, the question of constitutionality cannot be interposed. You will find that Mr. Justice Joslin passed on the question and denied the motion to certify this case to the Supreme Court. I think that is the law in this case.

Mr. Harvey: There are three cases which I would like to call to the Court's attention, leaving out for the moment the question of the constitutionality, which I say is the controlling factor, and those cases hold, and one is a Massachusetts case, 224 Mass. Newcomb vs. Page, that the question of whether or not New York taxes this same property is a material question. Also in a Pennsylvania case the court observed the same thing. Those cases will have to be cited to any court which hears this case, and when the court reads it, it will see the very question, in the Massachusetts case right in there as part of the opinion, the law of New York, as to whether or not this property is taxable in New York. As to the constitutionality, Judge Joslin had passed on this but he had not heard any testimony at that time.

The Court: Doesn't that make a difference? The court feels still quite strongly without attempting to overrule Judge Joslin or go contrary to his opinion, for whom I have

[fol. 37] the greatest respect, but here is Chapter 941 of the Public Laws:

"Whenever is any proceeding, civil or criminal, in the superior court or in any district court, prior to the trial thereof on its merits, or upon a motion in arrest of judgment, any question of law shall arise, or the constitutionality of an act of the general assembly shall be brought in question upon the record, which in the opinion of the court, or in the opinion of the attorney-general, if the state be a party to such proceeding, is of such doubt and importance, and so affects the merits of the controversy that it ought to be determined by the Supreme Court before further proceedings, the court in which the cause is pending shall certify such question or motion to the supreme court for that purpose and stay all further proceedings until the question is heard and determined: Provided, that no question shall be so certified in any criminal case where the defendant has not been released on bail."

Now, how am I bound in any way? Don't you think there is a question of importance raised on the question of constitutionality?

Mr. Burke: I don't think there is any question of importance raised here, Your Honor, that justified Your Honor [fol. 38] in finding for the plaintiff except a question of a constitutional question. Mr. Harvey will present two questions, whether this tax is valid, whether there is any valid tax, and secondly, if it is valid is it constitutional. It seems to me this case may be certified and the Supreme Court may send it back.

The Court: There won't be any great harm in that.

Mr. Burke: I think the city is entitled to have this matter determined upon its merits here today. If there is a constitutional question involved, it will go in the usual course to the Supreme Court. If there is any question of the validity of the tax, outside of its constitutionality, that has to be determined in this court in the first place. If it isn't determined in the first place and if the court decides this statute is constitutional, then it may go to the Supreme Court of the United States, and they may decide it is constitutional and then it comes back here again on the validity of this assessment. I think the proper procedure in this case is to let this case be decided here today on all the questions. If the plaintiff has made out a case, he is entitled to a decision. If he has not made out a case, the city is entitled to make this assessment.

[fol. 39] The Court: The only thing in this statute leaves the matter in the opinion of the court. You substitute yourself for the court. "In the opinion of the Court." It is my opinion it is of a constitutional nature and of such doubt and importance.

Mr. Burke: If that is your opinion, that is your opinion. You have the right.

The Court: You have a statute upon which taxes have been assessed which is presumed to be constitutional. Mr. Harvey raises the constitutional question. He says it is unconstitutional and illegal, and there should not be any assessment made.

Mr. Burke: I argued this matter at great length before Mr. Justice Joslin on the question of whether or not this statute was unconstitutional. We went into the question. I showed to Judge Joslin and I can show to Your Honor that this statute has been in effect almost a hundred years in Rhode Island, and the constitutionality of it has never been questioned.

The Court: Until today.

Mr. Burke: On the line of decisions on the subject I say there is not sufficient serious doubt presented here today to justify Your Honor in saying that this case does involve [fol. 40] such doubt and importance that it should be certified to the Supreme Court, in view of the statute for over a hundred years and the number of cases that have been brought under this statute testing its validity. The question of its constitutionality was never raised until this case, as far as I know.

The Court: If you make that argument before the Supreme Court perhaps they won't take much time in deciding it should be brought back here.

Mr. Harvey: There has never been any litigation in the Supreme Court under this statute on the facts such as these. Here is a deceased person who dies a resident of New York. All his property at the time of taxation, all the property held by the trustees, was in New York. The beneficiary is a resident of New York. New York State assesses a tax on this property.

Mr. Burke: I say the statute is plain in this case. It gives the power to the tax assessors. No question about their authority. The assessors know Mr. Greenough is a resident of New York. They know this property is in New York. They know George Henry Warren is a resident of

the city of Newport, and under that statute they made this assessment, and they are justified in doing so.

Mr. Harvey: That is non sequitur.

[fols. 41-47] Mr. Burke: The statute is plain in this case. Your Honor realizes that this matter, this case involves a very serious matter and is a very important matter in this State.

The Court: The court has that in mind. That is why the court is taking this slant on it. It is very important. It is a matter which should be straightened out once and for all if it has been attacked on its constitutionality.

Mr. Burke: That will have to be decided by the Supreme Court. It is Your Honor's duty——

The Court: The only difference between the court and counsel is that counsel says I must decide the case and then have either side take it up to the Supreme Court. The court feels that it should go up there immediately upon the question, and let them decide it once and for all.

Mr. Burke: They won't decide it once and for all.

The Court: Then they will send it back, and nobody will be too seriously harmed. It is barely started, and it is not an extensive trial up to date.

* * * * * * *

[fol. 48] 44 Q. Also I would ask you if you are familiar with the laws of New York as to the title which is vested in executors and trustee under the New York laws, as to whether it is a title which vests in them a joint tenancy or a tenancy in common?

A. I am familiar with the law. The law——

45 Q. Will you read from the law?

A. The law which I refer to is Section 66 of the Real Property Law. It provides as follows:

> "Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy; but every estate, vested in executors or trustees as such, shall be held by them in joint tenancy. This section shall apply as well to estates already created or vested as to estates hereinafter granted or devised."

Now, that statute, while on the real property law, has been held to apply equally to personal property. I might

say it has been so held by a court sitting in this State, reported in 23 Federal Supplement 905.

Mr. Harvey: I offer this certificate of appointment of [fol. 49] Mr. Greenough and Mr. Warren as trustees under the will of George Henry Warren senior.

Certificate marked "Petitioner's Exhibit 5."

Mr. Burke: No questions, Your Honor.

Mr. Harvey: We rest.

Motion to Dismiss

Mr. Burke: I wish to bring to Your Honor's attention that the assessment is made pursuant to Chapter 30, Section 9, Subdivision 5. The Statute has been strictly complied with in this case. George Henry Warren is a resident of Newport.. Under the terms of the statute he is taxable here, and he was taxed. The question here is whether or not this is a valid assessment.

Under the statute I contend there is no question about it. It is the duty of the assessors to assess as they did, and they did assess. Whether or not this statute is unconstitutional has to be determined by the Supreme Court. It cannot be determined here. The question of the constitutionality of this statute has been passed upon in this case by Judge Joslin, and I contend that is the law in this case. I therefore move the petition be dismissed.

[fol. 50] The Court: The motion is denied and your exception is noted.

Respondent's exception noted.

Decision re Certification to Supreme Court

The Court: After hearing the testimony in the case, as the court has already said, the question of the constitutionality of the assessment and of the statute under which it has been made having been raised in the bill and in the testimony in the case, the court feels that a question of such doubt and importance has been raised that this case should be certified to the Supreme Court. Counsel, the City Solicitor agrees that the matter should be passed upon by the Supreme Court. The question now is the way to get it there. It seems to me the court can pass upon it and then either side can go up on a bill of exceptions, or the court can certify it directly. The court feels that is the

better way, to certify it directly. If counsel will prepare the certification the court will so certify it. The exception of the respondent is noted.

Respondent's exception noted.

[fol. 51] April 2, 1945.

MOTION TO REOPEN CASE

Mr. Burke: I move to reopen the case, may it please the court.

The Court: All right, if there is no objection. Any objection?

Mr. Haire: No objection.

The Court: The motion is granted. The case is reopened.

JOHN B. SULLIVAN sworn.

By Mr. Burke:

1 Q. Mr. Sullivan, you have previously stated in this case that you are Chairman of the Board of Tax Assessors of the city of Newport?

A. Yes, sir.

2 Q. You have been for a number of years?

A. Yes, sir.

3 Q. Pursuant to the authority vested in you by the laws of this State you made the assessment which was referred to in the case before the court, the assessment as set out in Petitioners' Exhibit 2, which shows an assessment, bill No. 8105, name and address, George H. Warren, junior, trustee under the will of George H. Warren for Constance [fol. 52] W. Warren, intangible personal, $12,500, tax $50. You made that assessment?

A. We did.

4 Q. The Board of Assessors?

A. Yes, sir.

5 Q. Tell the court upon what factual information that assessment was made.

A. The records from the Probate Court sent to the assessors' office under the law showed the probating of a foreign will in the Probate Court, and a part of the record showed there were in the will——

6 Q. The will if you will tell us of whom?

A. George Henry Warren. A part of the record showed there were two trusts set up under that will, one in favor of George Henry Warren junior and the other in favor of Constance Whitney Warren. The Tax Assessors on getting that record at their office decided to investigate, and during the open sessions of the Board of Tax Assessors which began on June 16th and ended June 21, 1944, Mr. William P. Sheffield visited the office of the Tax Assessors as the representative of George Henry Warren junior, and while doing his business there the Chairman——

7 Q. George Henry Warren junior, Trustee?

A. George Henry Warren junior. While there the Chair- [fol. 53] man of the Board of Assessors asked Mr. Sheffield if he could secure any information with regard to whether or not any property had been paid into the trusts from the estate of George Henry Warren senior. Mr. Sheffield said that he would get that information if he could. The following day he returned and said that Mr. Warren junior had advised him that all of the property received by the trustees in both trusts, both trust estates, was $25,000 in each trust estate, but inasmuch as one of the trustees was not domiciled in Rhode Island, Mr. Warren felt that only one-half of the value of the property in each trust estate should be assessed. The Board of Assessors accepted that view and made the assessment in accordance with that arrangement and understanding.

8 Q. You said Mr. Warren. You mean Mr. Sheffield?

A. That was an expression from Mr. Sheffield to the Board as representing Mr. Warren's feelings in the matter.

9 Q. Did you have any other information upon which this assessment was made?

A. That is all.

10 Q. Then in substance you made the assessment on [fol. 54] one-half of the amount of the trust estate representing the ownership of George Henry Warren junior, the trustee who was a resident of the city of Newport and State of Rhode Island?

A. Yes, sir.

11 Q. And you made no assessment against the other half which was represented by William Greenough, the other trustee?

A. No, sir.

12 Q. Did Mr. Sheffield state to you at all in what fund this money was invested?

A. As I recall it, it was in a subsidiary of the Standard Oil Company of New Jersey.

13 Q. And the arrangement was agreeable to Mr. Sheffield as the representative of Mr. Warren that the assessment should be made on one-half of the amount of the trust estate, the assessment being made against George Henry Warren junior, trustee, pursuant to Chapter 30, Section 9, subdivision 5, I think it is?

Mr. Harvey: I object, Your Honor. The question is leading. That isn't so important. The testimony of the conversation has been given.

The Court: Isn't that so, Judge Burke? Isn't that a conclusion?

[fol. 55] Mr. Burke: Perhaps it is.

The Court: He can testify what was said and done. He has done that.

Mr. Burke: Very well.

14 Q. Have you any other information, Mr. Sullivan, to give the court upon the facts in this assessment?

A. No, sir.

Cross-examination.

By Mr. Harvey:

15 Q. You have no reason whatever to believe that the information to the effect that the intangible property then held by the trustees amounted to $25,000? You have no reason to believe that was not a correct statement?

A. None whatever.

Mr. Burke: The respondent rests, Your Honor.

Mr. Harvey: No further testimony.

The Court: The court is ready to decide this matter now if counsel has nothing further to say.

Mr. Harvey: I am anxious to get a quick decision in this [fol. 56] matter, but there are some cases, three cases that I would like to call to your Honor's attention. They are Newcomb vs. Page 113 N. E. 458, in re Dorrance Will, 3 Atl. 2nd. 682, and Goodsite vs. Lane, 139 Fed. 593.

Mr. Burke: The respondent wishes to cite to Your Honor the case of Petition of William J. H. Ailman and Samuel

R. Honey for an opinion, and I say that case fits this case very well.

Mr. Harvey: May I ask Your Honor in reading these cases to consider the fact that this statute has been in force for more than a hundred years, and no case has been decided and no question raised, as far as a very minute examination will show, wherein the combination of circumstances existed that exists in this case. Learned counsel on the other side cites the Ailman case, but there is an exception in that case, and the very exception takes it outside of this case. Here we have a combination of three things. We have the decedent who created this trust was a non-resident. The fund was never in Rhode Island. It was always in New York. In that case it was in Rhode Island. [fol. 57] Third, the beneficiary resides without the State.

WITHDRAWAL OF DECISION

The Court: The court will withdraw its decision sending the case to the Supreme Court for an interpretation of the statute. It will try and give decision in the matter as soon as I read the cases.

[fol. 58] I hereby certify that the foregoing is a true copy of the aforementioned case, according to my shorthand notes.

(S.) Catherine Fitzgerald, Stenographer Superior Court.

Approved and allowed:

(S.) Sullivan, J., Associate Justice Superior Court.

5/9/45.

[fols. 59-60] And, on the 10th day of November, 1943, there was filed in the office of the Probate Court, in said county of Newport, in said state of Rhode Island, the following:

PETITIONER'S EXHIBIT No. 1

WILL

I, George Henry Warren do make publish and declare this to be my last Will and Testament in manner and form following that is to say

. . . . . .

[fol. 61] Fifth. I give and bequeath unto my executors and trustees herein after named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the sum of Four hundred thousand dollars in trust nevertheless to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my daughter Constance Whitney Warren for and during her natural life and upon and after her decease or in the event my said daughter shall die before me then to assign trans-[fol. 62] fer and pay over the said principal sum of Four hundred thousand dollars so held in trust for her as aforesaid or the securities in which the same may then be invested and I give and bequeath the same unto her then living children in equal shares and unto the issue of any child of hers who may have previously died leaving issue then surviving such issue however to take the part or share which his her or their parent would have taken if living per stirpes and not per capita.

In the event however there shall be no child or children or issue of a deceased child or children of my said daughter then surviving then to hold and continue to hold the said sum of Four hundred thousand dollars upon the further trust to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my son George Henry Warren junior during his natural life and upon and after his decease then to assign transfer and pay over the said principal sum of Four hundred thousand dollars or the securities in which the same may then be invested and I give and bequeath the same unto his issue per stirpes and not per capita.

Sixth. I having survived my brother Whitney Warren and the trust created for me by the will of my father having terminated I give and bequeath to my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the sum of Two hundred thousand dollars in augmentation of and to be added to the principal of the trust created by the fourth [fols. 63-71] clause of this my will for the benefit of my son George Henry Warren junior to be held and disposed of by them upon the same terms and conditions as set forth

in such fourth clause and I do likewise give and bequeath to my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the further sum of Two hundred thousand dollars in augmentation of and to be added to the principal of the trust created by the fifth clause of this my will for the benefit of my daughter Constance Whitney Warren to be held and disposed of by them upon the same terms and conditions as set forth in said fifth clause.

* * * * * * *

[fol. 72] Lastly. I hereby revoke and annul all other or former wills by me at any time heretofore made

In Witness Whereof I have hereunto set my hand and affixed my seal this nineteenth day of April in the year One thousand nine hundred and forty-three.

George Henry Warren. (Seal.)

Signed sealed published and declared by the testator as and for his last will and testament in the presence of the undersigned who at his request in his presence and in the presence of each other have hereunto subscribed their names as witnesses.

James C. Lawler, residing at 147 So. Oxford St., B'klyn, N. Y. John F. Blewett, residing at 603 Ishman Street, New York City. Stephen J. Mc Garrigle, residing at Glen Ridge, New Jersey.

[fol. 73] PETITIONER'S EXHIBIT No. 2

Paid Under Protest

City of Newport, R. I.

Tax Bill 1944

City Tax Assessed June 15, 1944

For the Fiscal Year, April 1, 1944 to March 31, 1945

Tax Rate on each $100.00

Real Estate	$2.45
Tangible Personal	$2.45
Intangible Personal	$ .40

Bill No.	Name and Address	Valuation Real Estate	Tang. Per.	Intang.	Personal
8105	Warren George H. Jr. Trustee u/w George H. Warren for Constance Whitney Warren				

On Real Estate and Tangible	On Tangible Personal	Tax Total
	50.00	50.00
Penalty	At 8% per annum	.23
		50.23

Agnes Gould, Tax Collector, By: K. Denniston.

[fol. 74] PETITIONER'S EXHIBIT No. 3

New York, September 25th, 1944. No. 4

Manufacturers Trust Company 1-30

55 Broad Street

Pay to the Order of Agned Gould, Tax Collector $50.00

Fifty & 00/100 Dollars

"Paid under protest"

(S.) George Henry Warren, Trustee.
(S.) William Greenough, Trustee.

George Henry Warren, Jr. and William Greenough as Trustees for Constance Whitney Warren under the 5th and 6th Clauses of the Last Will and Testament of George Henry Warren, Deceased.

[fol. 75] PETITIONER'S EXHIBIT No. 4

William Greenough of the City, County and State of New York and George H. Warren, Jr., of the City and County of Newport and State of Rhode Island, as trustees under the will of George H. Warren late of said City of New York,

deceased, for the benefit of Constance Whitney Warren of said City of New York, hereby pay under protect the tax of $50.00 on Intangibles assessed against "George H. Warren, Jr. Trustee u/w of George H. Warren" and for cause of protest say that said tax is illegal, unconstitutional, null and void in that both the said William Greenough and Constance Whitney Warren are non-residents; that the provisions of Chapter 30, Section 9, Subdivision or proportionment of the taxes between resident and non-resident trustees under the same trust is unconstitutional; that said trust is not legally or constitutionally divisible between the trustees and is in violation of Section 2 of Article IV of the Constitution of the United States of America and they hereby reserve the right to recover from the City of Newport, the amount of said tax herein paid under protest.

William Greenough, George H. Warren, Jr., Trustees u/w George H. Warren, by (S.) Sheffield & Harvey, Attorneys.

October 2, 1944.

[fol. 76] PETITIONER'S EXHIBIT No. 5

No. 57153

The People of the State of New York

To all to whom these presents shall come or may concern.

Send Greeting:

Know Ye, That, we, having inspected the records of our Surrogate's Court in and for the County of New York, do find that on the 30th day of June, in the year one thousand nine hundred and forty-three, by said Court, Letters of Trusteeship under the will of George Henry Warren, deceased, were granted unto George Henry Warren, Jr., and William Greenough, as Trustees of the trusts created by said Will, and that it does not appear by said records that said letters have been revoked.

In testimony Whereof, we have caused the seal of office of the Surrogate's Court of the County of New York to be hereunto affixed.

Witness, Honorable James A. Foley.

County of New York, in the City of New York, the 4th day of November, in the year of our Lord one thousand nine hundred and forty-three.

(S.) George Laerch, Clerk of the Surrogate's Court.
Seal of New York Surrogate Court.

HA.
(Seal)

[fol. 77] EXHIBIT B

IN SUPERIOR COURT OF NEWPORT COUNTY.

DECISION—Filed April 25, 1945

SULLIVAN, *J.*

Heard on prayer of Petitioners for relief from tax assessment under the provisions of Sec. 14, of Chapter 31, of the General Laws, 1938. The facts set out in the petition are not in dispute and show briefly that George Henry Warren, a resident and citizen of New York, died June 3, 1943, leaving a will, which was duly admitted to probate in New York, and letters testamentary were issued to the Petitioners June 30, 1943, they being the executors named therein; that a copy of said will was filed in the Probate Court of Newport and letters testamentary in Rhode Island were issued to said Petitioners. Then comes the recital of the fifth and sixth clauses of the will giving to the executors and trustees named in said will Four hundred thousand dollars in trust for the benefit of testator's daughter, Constance Whitney Warren, for life. Paragraph sixth provides for a further addenda of Two hundred thousand dollars to be added to the original trust on the same terms and conditions; that said Greenough and Constance Whitney Warren are both residents of New York, while George Henry Warren, Jr., the other trustee, is a resident of Newport; that [fol. 78] the whole of the trust estate is now and has at all times been located in the City, County and State of New York; that the Respondents assessed George Henry Warren, Jr. upon intangible personal property held in trust by said Petitioners as trustees, on June 15, 1944, for the

benefit of Constance Whitney Warren, described in paragraph 2 of said petition as follows:

> Warren, George H., Jr., Trustee, U.W. of George H. Warren, Intangible Personal Property $12,500, Tax $50.

This tax was paid under protest and the Petitioners contend that said assessment is illegal, unconstitutional and void; (1) Because the property assessed was owned by a non-resident testator and was located in the State of New York and never located in Rhode Island; (2) Because the beneficiary for life and one of the trustees are residents of New York; (3) Because said trust fund is held by said trustees as joint tenants, their interest in said fund being not severable or divisible and their powers must be exercised as a unit; (4) Because Petitioner Warren, as a resident of Rhode Island, does not as trustee exercise his powers as trustee in Rhode Island and enjoys no protection or profit from this State; (5) Because said trust fund, on which said tax was assessed, is subject to the payment of the New York Income Tax, thereby resulting in double taxation; (6) Because Sub-section Fifth of Section 9, of Chapter 30, General Laws, 1938, under which said tax was levied is unconstitutional and in violation of Article V of the Amendments of the Constitution providing that no State "shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction equal protection of the law;" (7) Because Sub-section Fifth of [fol. 79] Section 9, of Chapter 30, of General Laws, 1938, and said tax levied against Petitioners is unconstitutional under provisions of Section 16, of Article I of the Constitution of Rhode Island, providing that no property shall be taken for public uses without just compensation.

The petition concludes with the prayer that said tax be declared illegal, unconstitutional and void; that judgment be given for the amount of the tax paid with penalty, interest and costs.

The Petitioners substantiated their allegations of fact by calling the Chairman of the Board of the Tax Assessors, the Clerk of the Probate Court of Newport and one of the Petitioners, William Greenough, an attorney of the New York Bar, who qualified as an expert and testified to the law of the State of New York on taxation applicable to the

facts in this case. The Chairman of the Board of the Tax Assessors was recalled by the Respondent and gave testimony as to further information he had received regarding the trust estate and value of the same.

The question raised by the petition, the plea and the evidence is purely one of law, no material fact being in dispute. In support of Petitioners' Contention, they have submitted for the Court's consideration the cases of *Goodsite* vs. *Lane*, et al, 139 Fed. 592; *Newcomb* vs. *Page*, 113 N. E. 458 and *In re Dorrance Will*, 3 At. 2nd. 682. These cases have much persuasive force but the issue raised in this case by the pleadings is whether the Statute under which the assessment was made is constitutional. In the case of *Payne & Butler* vs. *Providence Gas Company*, 31 R. I., 295 at page 313, the Supreme Court said:

> [fol. 80] "There is only one body that is authorized to interpret the statutes of this State with the view of determining their constitutionality. Under article XII of the amendments to the constitution of the State, adopted in November, 1903, section 1: 'The supreme court shall have final revisory and appellate jurisdiction upon all questions of law and equity.' Furthermore, a statute is constitutional or not, as the case may be, without reference to the interpretation of any board or boards of commissioners. It is deemed to be constitutional until this court shall have decided that it is not."

In the case of *Fritz* vs. *Presbrey* et al., 44 R. I. 207, our Court quoted from the East Shore Land Co. vs. Peckham, 33 R. I. 541, as follows:

> "'All statutes are presumed to be valid and constitutional and the burden of proving the unconstitutionality of any statute is upon the party raising the question; furthermore, the rule is that he must prove it beyond a reasonable doubt.'"

The Court, a little further on in the same case, quotes from Wellington et al., Petitioners, 16 Pick. 87 from the opinion of Chief Justice Shaw as follows:

> "'When called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give the force of law, courts will approach the question with great caution, examine

it in every possible aspect and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void unless the nullity and invalidity of the act are placed in their judgment beyond a reasonable doubt.' "

The assessment in question was made in strict compliance with Sub-section Fifth, of Section 9, of Chapter 30, of the General Laws, 1938, and there is nothing in the proof offered to justify the Court in saying that the tax assessors deviated in one iota in this assessment from the law as laid down in the above-mentioned statute. The petition is therefore denied.

[fol. 81] In Superior Court of Newport County

Petitioners' Bill of Exceptions—Filed May 3, 1945

The petitioners in the above entitled cause come and file their bill of exceptions and say that said cause was tried in the Superior Court at Newport before Mr. Justice Sullivan sitting without a jury on the 28th day of March and the 2nd day of April, A. D. 1945 and a decision was rendered on the 25th day of April, A. D. 1945 for the respondents denying the relief asked for in said petition and that certain exceptions were taken by the petitioner as follows:

First: To the Court's ruling allowing Q. 14 appearing on page 5 of transcript, the exception to said ruling appearing on page 5 of the transcript.

Second: To the decision of said Court by rescript filed April 25, 1945, denying the petition.

And the petitioners insist that each of said rulings constituted error prejudicial to them and that said error entitled them to a new trial or to have judgment entered in their favor.

Wherefore the petitioners tender this, their bill of exceptions and pray that the same may be allowed by the Court in accordance with law.

By their attorneys,

(S.) Sheffield and Harvey.

Approved & Allowed, Sullivan, J.
5/9/45.

[fol. 82] IN SUPREME COURT OF RHODE ISLAND

MOTION FOR LEAVE TO AMEND PETITION—Filed October 31, 1945

The Petitioners in the above entitled cause hereby move that they be allowed to amend the original petition filed in this cause in the Superior Court by striking out in Subsection (6) in Section 6 of said petition the Roman numeral V and substituting therefore the Roman Numeral XIV so that the same shall read as follows:

"(6) Because the provisions of subsection Fifth of Section 9 of Chapter 30 of the General Laws of 1938, and any tax levied against the petitioners as aforesaid thereunder, or under any other provision of law in the circumstances and under the conditions aforesaid is unconstitutional and in violation of Article XIV of the Amendments of the Constitution of the United States providing that no state 'shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.'"

(S.) William Greenough, George Henry Warren, Jr., by their attorneys, (S.) Sheffield & Harvey.

And on the 31st day of October, A. D. 1945, the foregoing motion was filed and granted.

[fol. 83] There appears on the jacket of the case the following entry:

Supreme Court 1945 May 12. Filed.
October 31, 1945.

Petitioner's motion to amend petition granted.
Motion of Attorney General to intervene granted.

[fol. 84] IN SUPREME COURT OF RHODE ISLAND

OPINION—Filed May 31, 1946.

BAKER, J.:

This is a petition for relief from the assessment of a tax and is brought under general laws 1938, chapter 31, #14. The petitioners are seeking to recover the tax heretofore paid by them under protest, the basis of their petition being that the tax in question was illegally and unconstitutionally assessed against one of them. The matter was heard in the superior court by a justice thereof sitting without a jury. He rendered a decision denying and dismissing the petition. A bill of exceptions containing two exceptions, one to the decision and another which is not now pressed, was thereafter prosecuted to this court by the petitioners and is now before us for consideration.

The evidence shows the following pertinent facts, among others. The petitioners, William Greenough and George Henry Warren, Jr., are the duly qualified executors and cotrustees under the will of George Henry Warren, who died June 3, 1943 and who was a resident of the city of New York. That will was duly admitted to probate by a decree of the surrogate's court of the county of New York entered June 30, 1943, and letters testamentary were issued to the petitioners. A copy of the will, authenticated under the act of Congress, was also ordered filed and recorded, and letters testamentary in Rhode Island were issued to the [fol. 85] petitioners by a decree of the probate court of the city of Newport in this state entered November 15, 1943.

Under the fifth clause of the will the petitioners were bequeathed the sum of $400,000 to be held by them in trust to pay the net income therefrom, in the first instance, to the testator's daughter Constance Whitney Warren for and during her natural life. The clause then contained other and further provisions respecting said sum and the income therefrom in the event of the taking place of certain contingencies not now material to the issues before us. By the sixth clause of the will the testator also bequeathed to the petitioners the further sum of $200,000 "in augmentation of and to be added to the principal of the trust created by the fifth clause of this my will for the benefit of my daughter Constance Whitney Warren to be held and

disposed of by them upon the same terms and conditions as set forth in said fifth clause".

Further, it appears from the evidence that the testator's daughter, Constance Whitney Warren is a resident of the state of New York; that the petitioner and trustee William Greenough is likewise a resident of that state; but that the petitioner and trustee George Henry Warren, Jr. is a domiciled resident of the city of Newport in this state. It is not disputed that at the time of the death of the testator and on June 15, 1944 at 12 o'clock noon, which was the time of the assessment of the tax involved in this proceeding, and at all times up to the hearing in the superior court, all of the intangible personal property constituting the principal of the above-mentioned trust fund was located in the city of New York and never has been located in this state.

[fol. 86] It is admitted that the tax in question was assessed by the respondents under the provisions of G. L. 1938, chap. 30, #9, subsec. fifth, which is as follows: "Intangible personal property held in trust by an executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator, or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee resides; and if there be more than one such executor, administrator, or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

According to the evidence a tax of $50 for the fiscal year 1944 to 1945 appears on the assessment roll of the city of Newport as follows: "George H. Warren junior, trustee under will of George H. Warren for Constance W. Warren, assessment of $12,500, intangible personal property". The uncontradicted evidence shows that, according to information given the tax assessors of Newport, prior to the above assessment, by an attorney at law representing the trustee George Henry Warren, Jr., $12,500 was one half of the sum held by the trustees on the date of the assessment as the then *corpus* of the aforesaid trust created under the fifth and sixth clauses of the testator's will.

The respondents argue that the petition was correctly denied and dismissed by the superior court because it could

not properly be brought in its present form under #14, and also because the petitioners were not entitled to recover the tax which they had paid, in view of the facts appearing [fol. 87] in evidence respecting the nature of such payment. These defenses were not set out by the respondents in any of their pleadings, were not brought to the attention of that court and apparently are raised for the first time in argument before us. Because of our ultimate disposition of the present petition, it is not necessary for us to pass upon the above questions and we shall, for the purposes of this case only, assume that the petition is properly brought and that the petitioners are not prevented from recovering the tax in question merely by reason of the evidence relating to the manner of its payment.

In support of their position, the petitioners contend that, properly construed, subsec. fifth of #9 has not application to the facts and circumstances disclosed by the evidence, and therefore that the tax appearing on the assessment roll of the city of Newport, as hereinbefore set out, is illegally assessed and is void. The petitioners also make the further argument that if the above statute is held to be applicable, then it is unconstitutional under Section 1 of article XIV of the amendments to the Constitution of the United States and under sec. 16 of art. I of the constitution of this state.

On the other hand, the respondents maintain that the only question for this court on the present record is the constitutionality of subsec. fifth of #9 under the above-mentioned provisions of the constitution of the United States and the constitution of this state. They urge that the question of the applicability of the state statute was not before, and was not decided by, the superior court and is not properly before us.

While the record of the hearing before the superior court [fol. 88] is not as clear and definite on that issue as is desirable, nevertheless we have come to the conclusion that such question was before that court and was decided by it adversely to the petitioners. After testimony had been taken setting out the material facts, the trial justice filed a rescript which ended in the following language: "The assessment in question was made in strict compliance with Sub-section Fifth, Section 9, of Chapter 30, of the General Laws, 1938, and there is nothing in the proof offered to justify the Court in saying that the tax assessors deviated in

one iota in this assessment from the law as laid down in the above-mentioned statute."

If this language cannot properly be construed as a finding that the statute was applicable, then in our opinion the trial justice was making no finding whatever since he showed in his rescript that he was aware that he had no authority to pass on the constitutionality of such statute, and no facts were in dispute. In our judgment we should not assume that he was filing a meaningless rescript. The only issue therefore on the present record which the superior court had jurisdiction to decide involved the applicability of the statute in question.

Whether or not subsec. fifth of #9 is applicable to the facts of the instant case merits careful consideration. We find nothing in the express provisions of the clause which in our opinion prevents it applicability. There is, at least, a direct authorization to the taxing body to impose a tax on the intangible personal property held by any resident trustee, and a direction as to the place and manner of levying [fol. 89] such a tax. The language used is simple and without ambiguity. The subsection is broad in its scope and there are no express exceptions or words of limitation employed. Resident trustees of trust originating in another jurisdiction are not specifically or by implication excluded from the operation of the subsection. In fact, the general assembly, in our opinion, has in the statute shown its intent that intangible personal property, wherever located, when in the possession of such resident trustees, is taxable in this state according to the terms thereof. Unquestionably in such matters the policy of the law is controlled and fixed by the legislative not the judicial branch of the state government.

The petitioners do not question the fact that the letter of the statute was followed by the respondents in assessing the tax involved here. The statute in substantially its present form has been construed by this court in several cases. See *Anthony v. Caswell*, 15 R. I. 159; *Ailman & Honey, Petitioners*, 17 R. I. 362. In the first of these the court held that the provisions of a statute in the language of the statute now before us did not permit a *nonresident* trustee, who had no property in this state, to be taxed in the town in this state where his *cestui que* trust resided.

In the second of the cases, however, the court upheld the tax assessed in Newport against the trustee there resident, who held in trust mortgages on real estate in Newport, but

who was appointed by a South Carolina court under the will of a deceased resident of that state. The *cestui que* trust who was entitled to the income of the trust estate resided in New York. Perhaps the tax in that case and the applicability of the statute to those facts can be more readily [fol. 90] supported than can the tax in the instant case because the trustee in that case had invested part of the trust estate in mortgages in Newport property, to which fact the court specifically referred in its opinion, whereas all the trust estate in the present case is located in New York. However, a careful consideration of the opinion leads us to the belief that in principle it fully supports the position that the taxing statute is applicable to the facts of the case now before us.

For example, in the *Ailman & Honey* case the court used the following language at pages 364, 365: "There is no question of the right of the State to put all property within its jurisdiction under contribution for necessary revenue. • • • In the case before us, the legal owner resides here, and he has invested a part of his trust estate here; so that the situs of the property is doubly fixed. The fact that the authority of the trustee comes from another State does not change the fact of his residence and legal title within this State; nor the fact that the property taxed is here, by reason of its investment in loans secured by mortgages within this State, which run to the trustee." (Italics ours.)

The court thus clearly holds that the fact that the trustee, the legal owner of the trust property, resides in this state fixed here for our tax purpose the *situs* of the trust property held by him in so far as intangible personal property is concerned. It is well settled that ordinarily a trustee is considered for taxation purposes to be the owner of the property which he holds in trust. The court so held in *Anthony v. Caswell, supra,* saying, at page 161: "The statute, following the common rule, clearly recognizes executors, administrators, and trustees as the owners, for the purposes [fol. 91] of taxation, of the property held in trust by them." The *situs* of intangible personal property for the imposition of a tax is at the domicile of such owner. *Edwards v. Cardarelli,* 65 R. I. 236.

We find, therefore, that, aside from any question of constitutionality, the provisions of subsec. fifth of #9 are applicable to the facts of the instant case, and that the tax assessed against George Henry Warren, Jr., as trustee

is to that extent valid and is not beyond the scope and authority of the statute.

Since this issue of applicability is largely governed, at least as far as we are concerned, by the principles laid down in our own cases as above indicated, it ordinarily would not be necessary to discuss authorities from other jurisdictions. The petitioners, however, have cited several cases upon which they strongly rely and we will refer to certain of them briefly. In these cases, on facts somewhat similar to those in the present case, it was held that the tax under consideration was improperly assessed. In our opinion they are distinguishable from the case now before us.

In *Newcomb* v. *Paige*, 224 Mass. 516, the court applied the principle of interstate comity and also found, at page 519, that a particular sentence in the Massachusetts taxing act "is some indication of a legislative purpose that a trust fund lawfully within the taxing jurisdiction of another State and there making a just contribution to the support of government, should not be made liable to another tax here." In the present case we perceive no indication of any such legislative purpose in our own act but, as we have stated, find from its language a directly contrary intent. In the *Ailman & Honey* case this court said, at page 364, referring [fol. 92] to the trust fund before it: "If it be thus liable to double taxation, here and elsewhere, that has to do with the policy of the law, over which we have no control."

In *Dorrance's Estate*, 333 Pa. 162, the court, in arriving at its decision, construed the language of the taxing statutes, in respect to the ownership, holding or possession of trust property, narrowly and also pointed out that the statute contained no provision for dividing such trust property among resident and nonresident trustees for the purpose of assessing the tax. Our statute, on the other hand, has a specific provision allowing proportionate taxation as to resident trustees.

Harrison v. *Com'r. of Corps. & Taxation*, 272 Mass. 422, involved the imposition of the Massachusetts income tax on trust estates originating and administered outside of that state, certain of the trustees, however, being residents therein. In refusing to allow the tax the court, at page 428, stated: "The principle, that the situs of intangible property held in trust, in the absence of other controlling factors follows the person of the trustee, becomes inapplicable because by a dominating law its situs is fixed in the

place where the testamentary trust was created and established and is being administered under direction of its court. For all purposes incident to the cases at bar, its situs is immovably established within the State where the testamentary trust of which it is a part is being administered." Such a holding in our opinion appears to be contrary in principle to the views already expressed by this court and so understood cannot be followed by us. We find no controlling factor which takes the instant case out of the general rule [fol. 93] respecting the *situs* of intangible personal property held in trust.

The petitioners also advance the argument that subsec. fifth, #9, should not be applied to the facts of this case because under the law of New York trustees have title to the trust property as joint tenants and must act as a unit in administering the trust. Although this fact is referred to in support of the decision in some cases, particularly in Massachusetts, we do not understand why it should, in and of itself, prevent the imposition by this state of a tax under subsec. fifth, #9, other requirements of that statute being complied with. The fact that such is the law in New York, where this trust was created, should not in our opinion be held to alone prevent the imposition of a tax by this state, if assessed on persons or property within its jurisdiction, unless such tax is held to be unconstitutional.

Finally, the petitioners contend that if subsec. fifth, #9, is found to be applicable to the facts herein, such clause is unconstitutional as being contrary to the "due process" clause of the constitution of the United States and to sec. 16 of Art. I of the constitution of this state, which prevents the taking of private property for public uses without just compensation.

Before we deal with this contention it should be determined whether or not it is properly before us. At the outset it should be noted that in this civil proceeding only the unconstitutionality of an act of the general assembly is brought in question upon the record and that no constitutional question of any other nature or kind is raised. That being so the provisions of G. L. 1938, chap. 545, as amended, apply. Section 1 of that chapter was repealed by P. L. 1940, chap. [fol. 94] 941, sec. 1, and #6 of chap. 545 was amended by sec. 2 of chap. 941 to read as follows: "Whenever in any proceedings, civil or criminal, in the superior court or in any district court, prior to the trial thereof on its merits,

or upon a motion in arrest of judgment, any question of law shall arise, or the constitutionality of an act of the general assembly shall be brought in question upon the record, which in the opinion of the court, or in the opinion of the attorney-general, if the state be a party to such proceeding, is of such doubt and importance, and so affects the merits of the controversy that it ought to be determined by the supreme court before further proceedings, the court in which the cause is pending shall certify such question or motion to the supreme court for that purpose and stay all further proceedings until the question is heard and determined * * *."

Under #1 of chap. 545, now repealed, the procedure involving certification of such questions before trial was relatively simple. Upon consideration we are of the opinion that in repealing 1 of chap. 545 and by amending #6 of that chapter as above set out it was not the intention of the general assembly to prevent entirely, in a civil case, the certification of constitutional questions of the kind now before us in instances where a justice of the superior court has refused to exercise his discretion in favor of immediate certification. In our opinion the object of sec. 2, chap. 941, P. L. 1940, was merely to give a justice of the superior court in the ordinary civil proceeding discretion in the matter of certifying to the supreme court such constitutional questions prior to the trial of the case, where previously such certification was mandatory. As we view it, the issue, on a [fol. 95] motion to certify under #6 as amended, is merely the time of certification and the refusal to certify immediately is not a final disposition of the motion. In our judgment such a motion when once made, if denied in the first instance, nevertheless remains alive until after the case is fully heard and determined, when it comes before us automatically and without further action, in the event a bill of exceptions or appeal is prosecuted to this court by either party.

While 6 as amended does not expressly provide for the above procedure, nevertheless in our opinion it may reasonably be implied therein in the interest of uniform practice and in the preservation of the right of certification under the above circumstances. Such a procedure in effect would be substantially analogous to that specifically provided for in #2 of chap. 545 in respect to the certification of this kind of a constitutional question in a criminal case. There it is

expressly provided that the decision of such question be reserved, that the trial of the case proceed to a determination as if the statute were constitutional, and that then, if the defendant is found guilty, the constitutional question raised is to be certified forthwith to the supreme court.

In the instant case the record shows that prior to the hearing in the superior court a motion was made to certify the constitutional question raised herein to the supreme court. Under our interpretation of the statute, as above set forth, the denial of that motion merely delayed the time of certification until the case came here on petitioners' exceptions after final hearing and decision. The certification of the constitutional question therefore is automatically before us for consideration and decision.

[fol. 96] The petitioners admittedly do not claim unconstitutionality on the ground of double taxation. It has recently been held that such taxation is permissible. See *Curry* v. *McCanless*, 307 U. S. 357; *State Tax Com. of Utah* v. *Aldrich*, 316 U. S. 174. The petitioners do urge as a valid ground for their claim that the state renders no equivalent for the tax against George Henry Warren, Jr. as trustee, and renders no protection and extends no benefit to the trust fund. This general test of constitutionality is based by them on the following language used in the majority opinion in *State Tax Comm. of Utah* v. *Aldrich, supra*, at page 181: "In line with our recent decisions • • • we repeat that there is no constitutional rule of immunity from taxation of intangibles by more than one State. In case of shares of stock, 'jurisdiction to tax' is not restricted to the domiciliary State. Another State which has extended benefits or protection, or which can demonstrate 'the practical fact of its power' or sovereignty as respects the shares • • • may likewise constitutionally make its exaction."

The petitioners maintain that in the instant case the above requirement is not met. We are of the opinion that it is. While it is true that nothing appears on the record to show that this state has as yet actually extended any specific benefit to or protection over the resident trustee or the trust fund, other than by the decree of the probate court of Newport hereinbefore mentioned, nothing indicates that the state is not ready, willing and capable of doing so if requested. We know of nothing in our statutes or decisions

which is of a discriminatory nature respecting a resident trustee of a trust originating in another state. Such trustee, in our opinion, would be entitled to the same benefits and [fol. 97] protection from the laws of this state as would any other natural person here resident.

But, however that may be, we are satisfied that the state can demonstrate the practical fact of its power or sovereignty over the resident trustee and through him over the trust fund which he holds. In the *Curry* case, *supra*, at page 366, the court states that rights to intangibles "are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. • • • Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived." And at page 372 the court used the following language: "In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile here."

Since a question involving the taxation of trustees and trust funds was raised in the *Curry* case, it is clear that the above general principles respecting intangibles were intended to apply as well to trusts and trustees as to ordinary ownership of that class of property. Further, those principles are stated in such broad and comprehensive terms in the cited cases that in our opinion it was intended that they should apply even though the actual evidences of the intangible property might not be in the taxing state. Thus [fol. 98] in the instant case, in our opinion, the residence in this state of the trustee George Henry Warren, Jr. gives it such power and sovereignty over him as trustee that, in proper proceedings, he would become amenable to the laws of this state and to the orders of its course, and likewise he would be afforded such benefit and protection, as trustee, as could properly be accorded him. In our

judgment the above test, when applied to the constitutionality of our taxing statute, is therefore satisfied by the facts shown.

A rule is enunciated in *Goodsite v. Lane*, 139 Fed. 593 (1905), cited by the petitioners, to the effect that for a tax on intangibles assessed against a resident trustee to be valid and constitutional he must be exercising his office of trustee within the state and enjoying as trustee privileges of value to the estate for which it is just the estate should pay. This rule, in our opinion, would be difficult of application if it appeared that the resident trustee exercised his office within the state only occasionally, or at different periods during a given year, and frequently that he did not so exercise his office at all. In any event, however, such rule, as we see it, is superseded and is no longer operative, because of the views expressed and the general principles set out by the supreme court of the United States regarding the taxation of intangibles in the recent cases of *Curry v. McCanless* and *State Tax Comm. of Utah* v. *Aldrich, supra*, and others.

We therefore find that subsec. fifth, #9, is not contrary to the provisions of section 1 of art. XIV of the amendments to the constitution of the United States or to sec. 16 of art. 1 of the constitution of this state, but is valid and constitu- [fol. 99] tional, and that the tax involved herein, under all the facts and circumstances, was properly assessed by the respondents against George Henry Warren, Jr., as trustee. The trial justice did not err in denying and dismissing the petition.

The petitioner's exceptions are overruled, and the case is remitted to the superior court.

[fols. 100-121] In Superior Court of Newport County

Order Entering Judgment for Defendants—Filed July 2, 1946

Now, after rendition by the Supreme Court of an opinion overruling the petitioners' exceptions to the decision of this Court denying the petition for relief from a tax assessment, and after remission of this cause to this Court, it is hereby

ordered that said petition is denied, and that judgment be entered for the defendants.

Enter:

(S) Cappelli, J. July 2, 1946.

Entered as an order of this Court this 2nd day of July, 1946. (S) John H. Greene, Jr., Clerk.

[fol. 122] IN SUPERIOR COURT OF NEWPORT COUNTY

PETITION FOR ALLOWANCE OF APPEAL, ASSIGNMENT OF ERROR AND PRAYER—Filed August 7, 1946

To the Presiding Justice of the Superior Court of the State of Rhode Island:

Considering themselves aggrieved by the final judgment of the Superior Court for the County of Newport entered after the opinion of the Supreme Court overruling the petitioners' exceptions to the decision of a Justice of the Superior Court denying and dismissing their petition for relief and the entry of judgment against them in the above cause, the Petitioners, William Greenough and George Henry Warren, Jr., Trustees under the will of George Henry Warren, hereby pray an allowance of appeal from the said decision and judgment to the United States Supreme Court and an order fixing the amount of the supersedeas bond.

And the said William Greenough and George Henry Warren, Jr., Trustees, as aforesaid, assign the following error in the records and proceedings in said cause.

That the Superior Court for the County of Newport erred in entering a final judgment for the defendants in said cause;

That the Supreme Court of Rhode Island erred in holding and deciding, as stated in the opinion filed in said cause on May 31, 1946, that subsection Fifth, Section 9 of Chapter 30 of the General Laws of Rhode Island, 1938, is not contrary to the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States, but held that the same is valid and constitutional as applied to George Henry Warren, Jr., one of the two trustees, [fol. 123] and that the tax involved in said cause under all

the facts and circumstances was properly assessed by the respondents as Tax Assessors of the City of Newport against George Henry Warren, Jr., as co-trustee, because he was a resident of Rhode Island. The validity of said section was denied and drawn in question by the petitioners throughout the proceeding in said cause on the ground of its being repugnant to the Constitution of the United States and in contravention thereof, for the reason that the State of Rhode Island renders no equivalent for the tax on one-half of the fund assessed against George Henry Warren, Jr., as trustee, and renders no protection and extends no benefit to the trust fund.

For such error, the petitioners, William Greenough and George Henry Warren, Jr., Trustees under the will of George Henry Warren, pray that said judgment entered in the Superior Court for the County of Newport be reversed and a judgment ordered in favor of the petitioners and for costs.

No previous application for this relief has been made to any court or judge.

By their attorneys,

(S.) William R. Harvey, William Greenough.

[fols. 124-131] In Superior Court of Newport County

Order Allowing Appeal—Filed August 7, 1946

The appellants in the above entitled suit and each of them having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Superior Court of the County of Newport and State of Rhode Island, on the 2nd day of July, A. D. 1946, and from each and every part thereof and having presented and filed their petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Superior Court of the State of Rhode Island in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Superior Court for the

County of Newport shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within forty (40) days from this date.

And it is further ordered that surety for costs on appeal be fixed in the sum of $1000.00.

Dated August 7, 1946.

(S.) Jeremiah E. O'Connell, Presiding Justice of the Superior Court of the State of Rhode Island.

[fol. 132] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 133] In the Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed—Filed September 3, 1946

Pursuant to subdivision 9 of rule 13 of the rules of the Court, the appellants state that the points on which they intend to rely are as follows:

That the Superior Court for the County of Newport of the State of Rhode Island erred in entering a final judgment for the defendants in said cause.

That the Supreme Court of the State of Rhode Island erred in holding and deciding, as stated in its opinion filed in said cause on May 31, 1946, that Subsection fifth, section 9 of Chapter 30 of the General Laws of Rhode Island, 1938 is not contrary to the provisions of Section 1 of Article XIV of the amendments to the Constitution of the United States, but held that the same is valid and constitutional as applied to George Henry Warren Jr., one of the two trustees, and that the tax involved was not an illegal tax but that the same was properly assessed by the respondents, as Tax Assessors of the City of Newport, on said trust estate and against George Henry Warren Jr. as trustee under the will of George H. Warren for Constance Whitman Warren because said George Henry Warren Jr. was a resident of Rhode Island, although William Greenough, his co-trustee, was a resident of the State of New York and the trust fund was located in the State of New York. The validity of said

section was denied and drawn into question by the petitioners throughout the proceedings in said cause on the ground of its being repugnant to the Constitution of the United States and in contravention thereof, for the reason that the State of Rhode Island renders no equivalent for the tax on one-half of the fund assessed against George Henry Warren Jr. as co-trustee, and renders no protection [fol. 134] and extends no benefit to the trust fund which is taxed.

Said appellants hereby designate the following parts of the record as unnecessary to be printed:

1. Testimony taken at hearing in Superior Court as set forth on pages 28, 29 and 42, 43, 44, 45, 46 and 47 of the Transcript of the record below.

2. The will of George Henry Warren which appears on pages 59 et seq. of the transcript of the record below, except Clauses Fifth and Sixth thereof which should be printed, either as part of the petition or part of petitioner's Exhibit 1.

3. Statement as to Jurisdiction which appears on Page 101 et seq. of the Transcript of the record below.

4. Petition for allowance of appeal, assignment and Prayer which appears on page 122 et seq. of the transcript of the record below.

5. Order Allowing Appeal which appears on page 124 of the transcript of the record below.

6. Appeal Bond which appears on page 125 et seq. of the transcript of the record below.

7. Praecipe which appears on page 127 of the transcript of the record below.

8. Affidavit of Service which appears on page 128 of the transcript of the record below.

9. Affidavit of Service which appears on page 129 of the transcript of the record below.

10. Citation which appears on page 130 of the transcript of the record below.

11. Return of Service of Citation which appears on page 131 of the transcript of the record below.

12. Statement of Appellees of grounds in opposition to appellate jurisdiction of above Court pursuant to Supreme [fol. 135] Court rule 12 which appears on page 132 et seq. of the transcript of the record below.

13. Affidavit of service of appellees statement which appears on page 135 of the transcript of the record below.

By their attorneys, William R. Harvey, William Greenough.

[fol. 136] AFFIDAVIT OF SERVICE

I, Lester D. Farrell, Deputy Sheriff for the County of Providence, on oath depose and say that I have made service of the Appellant's "Statement of Points to be relied upon and Designation of Parts of the Record to be Printed" on Edward L. Leahy, Tax Commissioner for the State of Rhode Island, on the 30th day of August, A. D. 1946, by leaving a true copy thereof in his hands and possesion.

Lester D. Farrell, Deputy Sheriff.

Subscribed and sworn to at Providence this 30th day of August, A. D. 1946. Before me, John J. McNealy, Notary Public. My Commission expires June 30, 1951.

Service $5.50.

[fol. 137] AFFIDAVIT OF SERVICE

I, William P. Walsh, Deputy Sheriff for the County of Newport, on oath depose and say that I have made service of the Appellants' "Statement of Points to be relief upon and Designation of Parts of the Record to be printed" on John C. Burke, City Solicitor, on the 30th day of August, A.D. 1946, by leaving a true copy thereof in his hands and possession.

Service	.75
Travel	5.00
Copy	.75
Notary	.50
	7.00

William P. Walsh.

Subscribed and sworn to at Newport this 30th day of August, A. D. 1946. Before me, Robert H. Chappell, Notary Public. (Seal.)

[fol. 137a] [File endorsement omitted.]

[fol. 138] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 461

ORDER NOTING PROBABLE JURISDICTION—October 21, 1946.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 51325. Rhode Island Superior Court of County of Newport, Term No. 461. William Greenough and George Henry Warren, Jr., Trustees, Appellants vs. Tax Assessors of the City of Newport; and Edward L. Leahy, Tax Administrator of the State of Rhode Island. Filed September 4, 1946. Term No. 461 O. T. 1946.

[fol. 56] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 461

WILLIAM GREENOUGH AND GEORGE HENRY WARREN, JR. TRUSTEES, Appellants,

v.

TAX ASSESSORS OF THE CITY OF NEWPORT; AND EDWARD L. LEAHY, TAX ADMINISTRATOR OF THE STATE OF RHODE ISLAND, Appellees

STIPULATION AND ADDITION TO RECORD

It is stipulated and agreed that the following Sixteenth clause of the will of George Henry Warren be made a part of the transcript of the record in this cause.

The Sixteenth clause provides as follows:

"Sixteenth: I hereby nominate constitute and appoint my son George Henry Warren junior and William Greenough the husband of my niece Charlotte Warren Greenough to be the executors of and trustees under this my will

"Upon the decease of either my said son or the said William Greenough or in the event either my said son or the said William Greenough shall resign or become for any reason disqualified to act as executor of and trustee under this my will before my estate has been fully administered or the trusts hereby created have been fully executed then I do hereby nominate constitute and appoint United States Trust Company of New York and its successor as executor of and trustee under this my last will and testament

"It is my will and I direct that no bond or other security shall be required by any surrogate probate court or judge of any court of or from my said executors or trustees under this my will or either of them for the performance of their duties under this my will or on account of the non-residence of any such executor or trustee or either of them."

William R. Harvey, William Greenough, Attorneys for Appellants; John C. Burke, City Solicitor, Attorney for Appellees; Irving H. Straswich, Attorney for Tax Administrator.

FILE COPY

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SEP 4 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 461

WILLIAM GREENOUGH AND GEORGE HENRY WARREN, JR., TRUSTEES,

Appellants,

vs.

TAX ASSESSORS OF THE CITY OF NEWPORT; AND EDWARD L. LEAHY, TAX ADMINISTRATOR OF THE STATE OF RHODE ISLAND

APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF NEWPORT, STATE OF RHODE ISLAND

STATEMENT AS TO JURISDICTION

WILLIAM R. HARVEY,
WILLIAM GREENOUGH,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 461

WILLIAM GREENOUGH AND GEORGE HENRY WARREN, JR., TRUSTEES,

Appellants,

vs.

TAX ASSESSORS OF THE CITY OF NEWPORT; AND EDWARD L. LEAHY, TAX ADMINISTRATOR OF THE STATE OF RHODE ISLAND

APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF NEWPORT, STATE OF RHODE ISLAND

STATEMENT AS TO JURISDICTION PURSUANT TO RULE 12 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

This is an appeal from the final judgment of the Superior Court of the County of Newport in the State of Rhode Island, which is the highest court of the State of Rhode Island in which the decision could be had in a cause wherein there is drawn in question the validity of a statute of the State of Rhode Island, on the ground of its being repugnant

to Section 1 of the Fourteenth Amendment to the Constitution of the United States and in contravention thereof.

This action was commenced in the Superior Court for the County of Newport, which in Rhode Island, is the Court of first instance. The case was taken from that Court to the Supreme Court of the State of Rhode Isalnd by a bill of exceptions after decision for the defendants and there the rulings and decision of the trial court were reviewed and the exception of the petitioner overruled and the case remitted to the Superior Court for Newport where judgment was entered for the defendants.

The action was a petition for relief from a tax assessment brought by the petitioners as trustees under the will of George Henry Warren, late of New York, deceased, against the Tax Assessors of the City of Newport under the provisions of the General Laws of Rhode Island 1938, Chapter 31, Section 14, page 111. The petitioners are seeking to recover back a tax paid by them under protest. The basis of the petition filed was that the tax in question was illegally and unconstitutionally assessed in violation of the Constitution of the United States. The evidence showed that the petitioners, William Greenough and George Henry Warren, Jr., are duly qualified co-trustees under the will of George Henry Warren, who died June 3, 1943 a resident of the City of New York, County of New York and State of New York, where the will was duly admitted to probate by a decree of the Surrogate's Court of the County of New York entered June 30, 1943 and letters testamentary issued to the petitioners, and a copy of the will authenticated under the Act of Congress was also ordered filed and recorded and letters testamentary in Rhode Island were issued to the petitioners by a decree of the Probate Court of the City of Newport, County of Newport and State of Rhode Island entered on November 15, 1943.

Under the fifth clause of the will, the petitioners were bequeathed the sum of $400,000 to be held by them in trust to pay the income to the testator's daughter Constance Whitney Warren for and during her natural life. By the Sixth clause of the will, the further sum of $200,000 was bequeathed to the petitioners to be held in the same manner as the $400,000 bequeathed under the Fifth clause.

The Testator's daughter Constance Whitney Warren, beneficiary for life was and is a resident of the State of New York and the petitioner and trustee, William Greenough, a resident of that state; that the petitioner and trustee, George Henry Warren, Jr., is a domiciled resident of the City of Newport in the State of Rhode Island. That at the time of the death of the testator and on June 15, 1944 at 12 o'clock noon, which was the time for the assessment of the tax involved in this proceeding and at all times up to the hearing in the Superior Court, all of the intangible personal property constituting the principal of the above mentioned trust fund was located in the City of New York and never had been located in Rhode Island.

The assessment was assessed by the respondent Tax Assessors under the provisions of General Laws of Rhode Island 1938, Chapter 30, Section 9, Subsection fifth, page 106 as follows:

> "Fifth. Intangible personal property held in trust by any executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee resides; and if there be more than one such executor, administrator or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

The evidence showed that a tax of $50 for the fiscal year 1944 to 1945 appears on the assessment roll of the City of Newport as follows:

> "Warren George H Jr Trustee UW of George H Warren for Constance Whitney Warren, Intangible Personal Property $12,500. Tax $50."

And that according to information given to the Tax Assessors of Newport prior to the above assessment by an attorney at law representing the trustee George Henry Warren, Jr., $12,50 was based on one-half of the sum held by the trustees on the date of the assessment as the then corpus of the trust.

Statutory Provisions as to Jurisdiction

This appeal is taken under Section 344 of Title 28 of the United States Code which is likewise Section 237 of the Judicial Code. This section provides that a final judgment or decree in any cause in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity may be reviewed by the Supreme Court of the United States upon appeal.

Statute of the State Involved

The statute of the State of Rhode Island involved is General Laws of Rhode Island, 1938, Chapter 30, Sec. 9, Subsection fifth, page 106, as follows:

> "Fifth. Intangible personal property held in trust by any executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator or trustee in the town

where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee resides; and if there be more than one such executor, administrator or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

Date of Judgment or Decree Sought to Be Reviewed

The date of the final judgment of the Superior Court for the County of Newport in the State of Rhode Island, sought to be reviewed is July 2, 1946. The date upon which the application for appeal is presented to the Presiding Justice of the Superior Court of the State of Rhode Island is August 7th 1946.

Opinions Delivered in the Courts Below

A copy of the opinion of the Supreme Court of the State of Rhode Island and the opinions of the Superior Court are hereto appended and marked Exhibits A, B and C respectively.

Substantiality of Questions Involved

This is a petition for relief from the assessment of a tax and is brought under General Laws of Rhode Island 1938, Chapter 31, Section 14. The question involved is whether under the provisions of Subsection Fifth of Section 9 of Chapter 30, page 106, of the General Laws of Rhode Island as follows:

"Fifth. Intangible personal property held in trust by any executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the

executor, administrator, or trustee resides; and if there be more than one such executor, administrator or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

a tax can constitutionally be assessed by the City of Newport on George Henry Warren, Jr., Trustee, one of two trustees under the will of George Henry Warren, a resident of New York. The sole basis for the tax is that George Henry Warren, Jr., as an individual resides in the City of Newport, County of Newport, State of Rhode Island. The tax was assessed as follows:

"Warren George H Jr Trustee UW of George H Warren for Constance Whitney Warren, Intangible Personal Prop[illegible] $12,500. Tax $50."

It appears from the evidence that the testator was a resident of the State of New York; that the beneficiary of the trust, the testator's daughter, is a resident of the State of New York; that the petitioner and trustee, William Greenough, is likewise a resident of that state and that the intangible property forming the trust estate is located there and the trust established and admistered under the laws of the State of New York by the co-trustees as joint tenants, and that the trust estate has never been in the State of Rhode Island.

The petition alleges that George Henry Warren, late a resident of the City, County and State of New York died on the 3rd day of June, A. D. 1943, leaving a last will and testament dated April 19, 1943, which by a decree of the Surrogate's Court of the County of New York entered on the 30th day of June, 1943, was duly admitted to probate and letters testamentary issued to the petitioners, the executors named therein; that by a decree of the Probate Court of the City of Newport in the County of Newport

and State of Rhode Island, entered on the 15th. day of November, A. D. 1943, a copy of said will authenticated under the Act of Congress, was ordered filed and recorded and letters testamentary in Rhode Island issued to the petitioners. That said will provided in Clauses Fifth and Sixth as follows:

"I give and bequeath unto my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the sum of Four hundred thousand dollars in trust nevertheless to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my daughter Constance Whitney Warren for and during her natural life and upon and after her decease or in the event my said daughter shall die before me then to assign transfer and pay over the said principal sum of Four hundred thousand dollars so held in trust for her as aforesaid or the securities in which the same may then be invested and I give and bequeath the same unto her then living children in equal shares and unto the issue of any child of hers who may have previously died leaving issue then surviving such issue however to take the part or share which his her or their parent would have taken if living per stirpes and not per capita.

"In the event however there shall be no child or children or issue of a deceased child or children of my said daughter then surviving then to hold and continue to hold the said sum of Four hundred thousand dollars upon the further trust to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my son George Henry Warren junior during his natural life and upon and after his decease then to assign

transfer and pay over the said principal sum of Four hundred thousand dollars or the securities in which the same may then be invested and I give and bequeath the same unto his issue per stirpes and not per capita."

"Sixth: * * * I do likewise give and bequeath to my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the further sum of Two hundred thousand dollars in augmentation of and to be added to the principal of the trust created by the fifth clause of this my will for the benefit of my daughter Constance Whitney Warren to be held and disposed of by them upon the same terms and conditions as set forth in said fifth clause."

The petition then alleges that William Greenough, one of the trustees appointed under Clauses Fifth and Sixth respectively, is a resident of the State of New York, George Henry Warren, Jr., the other trustee is a resident of the City of Newport, and that Constance Whitney Warren, the beneficiary for life under said trust is a resident of the State of New York; that all of the intangible personal property constituting the principal of said trust was, at the time of the death of said George Henry Warren and on the 15th day of June, 1944, at 12 o'clock noon, the time fixed for the assessment of the tax, and at all times since the death of said George Henry Warren was and is now located in the City, County and State of New York and never has been located in the State of Rhode Island and has not received or enjoyed any benefit or protection from the laws of the State of Rhode Island. The petition then alleges the assessment of the tax; that on the 30th day of September, A. D. 1944, your Petitioners paid said tax under protest.

The petition then alleges:

"6. That the assessment of said tax against said George Henry Warren, Jr. Trustee under the will of George Henry Warren is illegal, unconstitutional and void:

(1) Because the fund constituting the intangible personal property upon which said tax was assessed was owned by a non-resident testator and was, on the 15th day of June, 1944, located in the State of New York and was never in the State of Rhode Island.

(2) Because, in addition thereto, the beneficiary for life of the aforesaid trust fund and one of the trustees are residents of the City of New York.

(3) Because the trustees of said trust fund hold said trust fund, so located in the State of New York, as joint tenants, and their title and interest in said fund as such joint tenants are not severable or divisible for the purposes of taxation or otherwise, and their powers must be exercised as a unit.

(4) Because George Henry Warren, Jr., as an individual resident of Rhode Island, does not, as trustee, exercise his powers as trustee in Rhode Island, nor does he, as trustee, enjoy any profits or protection from the laws of Rhode Island.

(5) Because said trust fund upon which said tax was assessed is, under the laws of the State of New York, subject to the payment of the New York income tax, and the taxation of said fund as intangible personal property in the State of Rhode Island subjects said fund to double taxation.

(6) Because the provisions of subsection Fifth of Section 9 of Chapter 30 of the General Laws of 1938, and any tax levied against the petitioners as aforesaid thereunder, or under any other provisions of law in the circumstances and under the conditions aforesaid is unconstitutional and in violation of Article XIV

of the Amendments of the Constitution of the United States providing that no state 'shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction equal protection of the law.'

(7) Because the provisions of Subsection Fifth of Section 9 of Chapter 30 of the General Laws of 1938, and any tax levied against the petitioners as aforesaid thereunder or under any provisions of law in the circumstances and under the conditions aforesaid, is unconstitutional and in violation of the provisions of Section 16 of Article I of the Constitution of the State of Rhode Island, providing that private property shall not be taken for public uses without just compensation.

7. That by reason of the above, your petitioners are entitled to recover from the City of Newport the said tax paid by them as aforesaid:"

(The original petition erroneously referred to Article V. This was later amended by order of the Supreme Court entered November 30, 1945 to read Article XIV.)

The respondents filed a demurrer to the petition and a motion to strike out William Greenough as one of the petitioners. The motion to strike out was denied. The demurrer was overruled. See rescript of Sullivan J., Exhibit B, hereto attached.

The respondents filed an answer as follows:

"And for a further plea in this behalf, the defendants say that the Petitioners ought not to have or maintain their action against them, because, they say, that the assessment of said tax against said George H. Warren, Jr., Trustee under the will of George Henry Warren, is not illegal, unconstitutional and/or void. And this the defendants are ready to verify. Wherefore, they pray judgment if the Petitioners ought to have or maintain their action against them, etc."

"And for a further plea in this behalf, the defendants say that the petitioner and/or petitioners ought not to

have or maintain their action against them because, they say, that the assessment on the intangible personal estate of the petitioner, George H. Warren, Jr., Trustee, was not illegal, unconstitutional and/or in violation of the provisions of Article XIV of the Amendments of the Constitution of the United States as complained of by the petitioner. And this the defendants are ready to verify. Wherefore, they pray judgment if the petitioners ought to have or maintain their action against them, etc."

On December 14th, 1944, the petitioners filed a motion as follows:

"Suggestion of Constitutionality of an Act of the General Assembly.

"The petitioners in the above entitled cause hereby represent that the constitutionality of an act of the General Assembly is brought in question upon the record of said cause and so far affects the merits of the controversy that it ought to be determined by the Supreme Court before further proceedings; Wherefore they move that said cause be certified to the Supreme Court for its determination thereof."

This was filed in accordance with the provisions of General Laws, Rhode Island, 1938, Chapter 545, page 1028 as amended by the Public Laws of Rhode Island, 1940, Chapter 941, Sec. 1, page 620 and sec. 6 of Chapter 545 as amended by Sec. 2 of Chapter 941 of the Public Laws of Rhode Island, 1940, page 620, as follows:

"Whenever in any proceedings, civil or criminal, in the superior court or in any district court, prior to the trial thereof on its merits, or upon a motion in arrest of judgment, any question of law shall arise, or the constitutionality of an act of the general assembly shall be brought in question upon the record, which in the opinion of the court, or in the opinion of the attorney-general, if the state be a party to such proceeding, is

of such doubt and importance, and so affects the merits of the controversy that it ought to be determined by the supreme court before further proceedings, the court in which the cause is pending shall certify such question or motions to the supreme court for that purpose and stay all further proceedings until the question is heard and determined . . . ."

The Court in the exercise of its discretion declined to certify the case at that time.

From all of the above it is clear that the question of the constitutionality of the statute was raised directly in the pleadings, in the petition, in the answer and by a motion filed and at the hearing on the merits as shown by a copy of the transcript of testimony filed herewith.

Transcript page 2: (See P. 20 of this Transcript)

"Mr. Harvey: . . . The petition recites that George H. Warren senior at the time of his death was a legal resident of the State of New York; that he died and his will was probated before the Surrogate's Court of the County of New York, and that letters testamentary were issued to George H. Warren junior and William Greenough, the executors, and that those two were appointed trustees under Sections 5 and 6 of his will; that William Greenough, one of the trustees, is a resident of New York; that Constance Whitney Warren, a beneficiary for life, is a resident of New York; that a fund constituting $12,500 was on the 15th of June, 1944 and at all times for that matter, in the State of New York and was never in the State of Rhode Island; that under these conditions and from these facts that taxation of George H. Warren junior against George H. Warren junior as trustee on $12,500 worth of intangible personal property, which constituted on the 15th of June one-half of the intangible property then held by these trustees in the State of New York is unconstitutional and void and illegal, both under the Constitution of the United States, citing Article 5 of the

amendments to the Constitution of the United States, and is also in violation of the Constitution of the State of Rhode Island."

Transcript, pages 16, 17, 18, 19, 20, 21, 22, 23 and 24: (See Ps. 34, 35, 36, 37, 38, 39, 40, 41, 42 of this Transcript)

"The Court: Is there any allegation they are being taxed on this property for which—the City of Newport has made an assessment which is unconstitutional?

"Mr. Burke: That would come up under a constitutional question.

"The Court: It seems to me you have a constitutional question raised here. I think this case should go to the Supreme Court. The court does not desire to shut you off, but the statute as I read it, and the allegation of unconstitutionality in the assessment, the court feels it is of such vital importance to the city of Newport, the financial department of the city of Newport, that this matter should be certified to the Supreme Court for an opinion. There is no use sending it up piecemeal, and neither is there any use in setting it out piecemeal now and asking me to decide the question, when it is alleged in the bill that this assessment is in violation of the State and Federal Constitution and it is double taxation. It seems to the court it will not do any harm to the Supreme Court to have Mr. Greenough express an opinion as an expert as to the allegation set out in the bill.

"Mr. Burke: On the question of constitutionality that was brought up here some time ago and the motion was denied to have the case certified. I think as far as this court is concerned, the question of constitutionality cannot be interposed. You will find that Mr. Justice Joslin passed on the question and denied the motion to certify this case to the Supreme Court. I think that is the law in this case.

"Mr. Harvey: There are three cases which I would like to call to the court's attention, leaving out for the moment the question of the constitutionality, which I

say is the controlling factor, and those cases hold, and one is a Massachusetts case, 224 Mass. Newcomb *v.* Page, that the question of whether or not New York taxes this same property is a material question. Also in a Pennsylvania case the court observed the same thing. Those cases will have to be cited to any court which hears this case, and when the court reads it, it will see the very question, in the Massachusetts case right in there as part of the opinion, the law of New York, as to whether or not this property is taxable in New York. As to the constitutionality, Judge Joslin had passed on this but he had not heard any testimony at that time.

"The Court: Doesn't that make a difference? The Court feels still quite strongly without attempting to overrule Judge Joslin or go contrary to his opinion, for whom I have the greatest respect, but here is Chapter 941 of the Public Laws:

"'Whenever in any proceeding, civil or criminal, in the superior court or in any district court, prior to the trial thereof on its merits, or upon a motion in arrest of judgment, any question of law shall arise, or the constitutionality of an act of the general assembly shall be brought in question upon the record, which in the opinion of the court, or in the opinion of the attorney-general, if the state be a party to such proceeding, is of such doubt and importance, and so affects the merits of the controversy that it ought to be determined by the Supreme Court before further proceedings, the court in which the cause is pending shall certify such question or motion to the supreme court for that purpose and stay all further proceedings until the question is heard and determined: Provided, that no question shall be so certified in any criminal case where the defendant has not been released on bail.'"

"Now, how am I bound in any way? Don't you think there is a question of importance raised on the question of constitutionality?

"Mr. Burke: I don't think there is any question of importance raised here, Your Honor, that justified

your Honor in finding for the plaintiff except a question of a constitutional question. Mr. Harvey will present two questions, whether this tax is valid, whether there is any valid tax, and secondly, if it is valid is it constitutional. It seems to me this case may be certified and the Supreme Court may send it back.

"The Court: There won't be any great harm in that.

"Mr. Burke: I think the city is entitled to have this matter determined upon its merits here today. If there is a constitutional question involved, it will go in the usual course to the Supreme Court. If there is any question of the validity of the tax, outside of its constitutionality, that has to be determined in this court in the first place. If it isn't determined in the first place and if the court decides this statute is constitutional, then it may go to the Supreme Court of the United States, and they may decide it is constitutional and then it comes back here again on the validity of this assessment. I think the proper procedure in this case is to let this case be decided here today on all the questions. If the plaintiff has made out a case, he is entitled to a decision. If he has not made out a case, the city is entitled to make this assessment.

"The Court: The only thing is this statute leaves the matter in the opinion of the court. You substitute yourself for the court. 'In the opinion of the court.' It is my opinion it is of a constitutional nature and of such doubt and importance.

"Mr. Burke: If that is your opinion, that is your opinion. You have the right.

"The Court: You have a statute upon which taxes have been assessed which is presumed to be constitutional. Mr. Harvey raised the constitutional question. He says it is unconstitutional and illegal, and there should not be any assessment made.

"Mr. Burke: I argued this matter at great length before Mr. Justice Joslin on the question of whether or not this statute was unconstitutional. We went into the question. I showed to Judge Joslin and I

can show to Your Honor that this statute has been in effect almost a hundred years in Rhode Island, and the constitutionality of it has never been questioned.

"The Court: Until today.

"Mr. Burke: On the line of decisions on the subject I say there is not sufficient serious doubt presented here today to justify Your Honor in saying that this case does involve such doubt and importance that it should be certified to the Supreme Court, in view of the statute for over a hundred years and the number of cases that have been brought under this statute testing its validity. The question of its constitutionality was never raised until this case, as far as I know.

"The Court: If you make that argument before the Supreme Court perhaps they won't take much time in deciding it should be brought back here.

"Mr. Harvey: There has never been any litigation in the Supreme Court under this statute on the facts such as these. Here is a deceased person who dies a resident of New York. All his property at the time of taxation, all the property held by the trustees, was in New York. The beneficiary is a resident of New York. New York State assesses a tax on this property.

"Mr. Burke: I say the statute is plain in this case. It gives the power to the tax assessors. No question about their authority. The assessors know Mr. Greenough is a resident of New York. They know this property is in New York. They know George Henry Warren is a resident of the City of Newport, and under that Statute they made this assessment, and they are justified in doing so.

"Mr. Harvey: That is non sequitur.

"Mr. Burke: The statute is plain in this case Your Honor realizes that this matter, this case involves a very serious matter and is a very important matter in this state.

"The Court: The court has that in mind. That is why the court is taking this slant on it. It is very important. It is a matter which should be straight-

ened out once and for all if it has been attacked on its constitutionality.

"Mr. Burke: That will have to be decided by the Supreme Court. It is Your Honor's duty——

"The Court: The only difference between the court and counsel is that counsel says I must decide the case and then have either side take it up to the Supreme Court. The court feels that it should go up there immediately upon the question, and let them decide it once and for all.

"Mr. Burke: They won't decide it once and for all.

"The Court: Then they will send it back, and nobody will be too seriously harmed. It is barely started, and it is not an extensive trial up to date.

"Question read by stenographer as follows:

"'Q. Will you state whether or not under the laws of the State of New York you and Mr. George H. Warren junior as trustees are in any way taxable on the property held by you under the fifth and sixth clauses of the will of George H. Warren senior for the benefit of Constance Whitney Warren?'"

Page 32 of Transcript: (See P. 50 of this Transcript).

"The Court: After hearing the testimony in the case, as the court has already said, the question of the constitutionality of the assessment and of the statute under which it has been made having been raised in the bill and in the case, the court feels that a question of such doubt and importance has been raised that this case should be certified to the Supreme Court. Counsel, the City Solicitor agrees that the matter should be passed upon by the Supreme Court. The question now is the way to get it there. It seems to me the court can pass upon it and then either side can go up on a bill of exceptions . . ."

The case, however, was not at that time certified, but was heard and decided.

The trial judge in his rescript stated on pages 29-30 of Exhibit B: (See P's 78, 79 of this transcript)

"This tax was paid under protest and the Petitioners contend that said assessment is illegal, unconstitutional and void: (1) Because the property assessed was owned by a non-resident testator and was located in the State of New York and never located in Rhode Island; (2) Because the beneficiary for life and one of the trustees are residents of New York; (3) Because said trust fund is held by said trustees as joint tenants, their interest in said fund being not severable or divisible and their powers must be exercised as a suit; (4) Because Petitioner Warren as a resident of Rhode Island, does not as trustee exercise his powers as trustee in Rhode Island and enjoys no protection or profit from this State; (5) Because said trust fund, on which said tax was assessed, is subject to the payment of the New York Income tax, thereby resulting in double taxation; (6) Because Sub-section Fifth of Section 9, of Chapter 30, General Laws, 1938, under which said tax was levied is unconstitutional and in violation of Article V of the Amendments of the Constitution providing that no state 'shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction equal protection of the law;' (7) Because Subsection Fifth of Section 9, of Chapter 30, of General Laws, 1938, and said tax levied against Petitioners, is unconstitutional under provisions of Section 16, of Article I of the Constitution of Rhode Island, providing that no property shall be taken for public uses without just compensation."

"The petition concludes with the prayer that said tax be declared illegal, unconstitutional and void; that judgment be given for the amount of the tax paid with penalty, interest and costs." . . .

Page 30 of Exhibit B: (See p. 79 of this transcript)

"The question raised by the petition, the plea and the evidence is purely one of law, no material fact being

in dispute. In support of Petitioners' contention, they have submitted for the Court's consideration the cases of *Goodsite v. Lane, et als.*, 139 Fed. 593; *Newcomb v. Page*, 113 N. E. 458 and *In re Dorrance Will*, 3 At. 2nd, 682. These cases have much persuasive force but the issue raised in this case by the pleadings is whether the Statute under which the assessment was made is constitutional. In the case of *Payne & Butler v. Providence Gas Company*, 31 R. I. 295, at page 313, the Supreme Court said:

Page 30-31 of Exhibit B: See p. 80 of this transcript)

"There is only one body that is authorized to interpret the statutes of this State with the view of determining their constitutionality. Under article XII of the amendments to the constitution of the State, adopted in November, 1903, section 1: 'The Supreme Court shall have final revisory and appellate jurisdiction upon all questions of law and equity.' Furthermore, a statute is constitutional or not, as the case may be, without reference to the interpretation of any board or boards of commissioners. It is deemed to be constitutional until this court shall have decided that it is not."

After decision of the Superior Court for the respondents as set forth in the rescript of Sullivan, J., attached hereto marked Exhibit B, the case went to the Supreme Court on the petitioners' bill of exceptions. In the Supreme Court, the Attorney General of Rhode Island moved to intervene because the validity of a state statute was attacked. This motion was granted and the State Tax Commissioner of Rhode Island appeared, filed a brief and argued the validity and constitutionality of the statute in question before the Court.

The opinion of the Supreme Court of Rhode Island squarely held that the statute was valid and constitutional.

Page 32, Exhibit C: (See p. 84 of this transcript)

"This is a petition for relief from the assessment of a tax and is brought under general laws 1938,

Chapter 31, S14. The petitioners are seeking to recover the tax heretofore paid by them under protest, the basis of their petition being that the tax in question was illegally and unconstitutionally assessed against one of them. The matter was heard in the superior court by a justice thereof sitting without a jury. He rendered a decision denying dismissing the petition. A bill of exceptions containing two exceptions, one to the decision and another which is not now pressed, was thereafter prosecuted to this court by the petitioners and is now before us for consideration."

Page 34, Exhibit C: (See p. 87 of this transcript)

"In support of their position, the petitioners contend that, properly construed, subsec. fifth of S9 has no application to the facts and circumstances disclosed by the evidence, and therefore that the tax appearing on the assessment roll of the city of Newport, as hereinbefore set out, is illegally assessed and is void. The petitioners also make the furtner argument, that if the above statute is held to be applicable, then it is unconstitutional under section I of article XIV of the amendments to the constitution of the United States and under sec. 16 of art. I of the constitution of this state.

"On the other hand, the respondents maintain that the only question for this court on the present record is the constitutionality of subsec. fifth of S9 under the above-mentioned provisions of the constitution of the United States and the constitution of this state. They urge that the question of the applicability of the state statute was not before, and was not decided by, the superior court and is not properly before us . . . ."

Page 38-39, Exhibit C: (See p. 93 of this transcript)

"The petitioners also advance the argument that subsec. fifth, #9, should not be applied to the facts of this case because under the law of New York trustees have title to the trust property as joint tenants and

must act as a unit in administering the trust. Although this fact is referred to in support of the decision in some cases, particularly in Massachusetts, we do not understand why it should, in and of itself, prevent the imposition by this state of a tax under subsec. fifth, S9, other requirements of that statute being complied with. The fact that such is the law in New York, where this trust was created, should not in our opinion be held to alone prevent the imposition of a tax by this state, if assessed on persons or property within its jurisdiction, unless such tax is held to be unconstitutional.

"Finally, the petitioners contend that if subsec. fifth, S9, is found to be applicable to the facts herein, such clause is unconstitutional as being contrary to the 'due process' clause of the constitution of the United States and to sec. 16 of Art. I of the constitution of this state, which prevents the taking of private property for public uses without just compensation

. . . . . .

Page 41, Exhibit C: (See p. 95 of this transcript)

"In the instant case the record shows that prior to the hearing in the superior court a motion was made to certify the constitutional question raised herein to the supreme court. Under our interpretation of the statute as above set forth, the denial of that motion merely delayed the time of certification until the case came here on petitioners' exceptions after final hearing and decision. The certification of the constitutional question therefore is automatically before us for consideration and decision.

Pages 41-43, Exhibit C: (See ps. 96, 97, 98, 99 of this transcript)

"The petitioners admittedly do not claim unconstitutionality on the ground of double taxation. It has recently been held that such taxation is permissible. See *Curry* v. *McCanless*, 307 U. S. 357; *State Tax*

Comm. of Utah v. *Aldrich*, 316 U. S. 174. The petitioners do urge as a valid ground for their claim that the state renders no equivalent for the tax against George Henry Warren, Jr. as trustee, and renders no protection and extends no benefit to the trust fund. This general test of constitutionality is based by them on the following language used in the majority opinion in *State Tax Comm. of Utah* v. *Aldrich*, *supra*, at page 181: 'In line with our recent decisions * * * we repeat that there is no constitutional rule of immunity from taxation on intangibles by more than one State. In case of shares of stock, 'jurisdiction to tax' is not restricted to the domiciliary State. Another State which has extended benefits or protection, or which can demonstrate 'the practical fact of its power' or sovereignty as respects the shares * * * may likewise constitutionally make its exaction.'

"The petitioners maintain that in the instant case the above requirement is not met. We are of the opinion that it is. While it is true that nothing appears on the record to show that this state has as yet actually extended any specific benefit to or protection over the resident trustee or the trust fund, other than by the decree of the probate court of Newport hereinbefore mentioned, nothing indicates that the state is not ready, willing and capable of doing so if requested. We know of nothing in our statutes or decisions which is of a discriminatory nature respecting a resident trustee of a trust originating in another state. Such trustee in our opinion, would be entitled to the same benefits and protection from the laws of this state as would any other natural person here resident.

"But, however, that may be, we are satisfied that the state can demonstrate the practical fact of its power or sovereignty over the resident trustee and through him over the trust fund which he holds. In the *Curry* case, *supra*, at page 366, the court states that rights to intangibles 'are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection

which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. * * *. Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived.' And at page 372 the court used the following language: 'In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there.'

"Since a question involving the taxation of trustees and trust funds was raised in the Curry case, it is clear that the above general principles respecting intangibles were intended to apply as well to trusts and trustees as to ordinary ownership of that class of property. Further, those principles are stated in such broad and comprehensive terms in the cited cases that in our opinion it was intended that they should apply even though the actual evidences of the intangible property might not be in the taxing state. Thus in the instant case, in our opinion, the residence in this state of the trustee George Henry Warren, Jr. gives it such power and sovereignty over him as trustee that, in proper proceedings, he would become amenable to the laws of this state and to the orders of its courts, and likewise he would be afforded such benefit and protection, as trustee, as could properly be accorded him. In our judgment the above test, when applied to the constitutionality of our taxing statute, is therefore satisfied by the facts shown.

"A rule is enunciated in *Goodsite* v. *Lane*, 139 Fed. 593 (1905) cited by the petitioners, to the effect that for a tax on intangibles assessed against a resident trustee to be valid and constitutional he must be exercising his office of trustee within the state and enjoying as trustee privileges of value to the estate for which it is just the estate should pay. This rule, in

our opinion, would be difficult of application if it appeared that the resident trustee exercised his office within the state only occasionally, or at different periods during a given year, and frequently that he did not so exercise his office at all. In any event, however, such rule, as we see it, is superseded and is no longer operative, because of the views expressed and the general principles set out by the supreme court of the United States regarding the taxation of intangibles in the recent cases of *Curry* v. *McCanless* and *State Tax Comm. of Utah* v. *Aldrich, supra*, and others.

"We therefore find that subsec. fifth, Sec. 9 is not contrary to the provisions of section 1 of art. XIV of the amendments to the constitution of the United States or to sec. 16 of Art. I of the constitution of this state, but is valid and constitutional, and that the tax involved herein, under all the facts and circumstances, was properly assessed by the respondents against George Henry Warren, Jr. as trustee. The trial justice did not err in denying and dismissing the petition.

"The petitioners' exceptions are overruled, and the case is remitted to the superior court."

The case was remitted to the Superior Court for the County of Newport and on July 2, 1946 the Superior Court entered an order denying a petition and giving judgment to the defendants which became a final judgment in said cause.

It will be noted the question of the validity of this statute was constantly before the Court during all the proceedings and squarely raised and decided.

The petitioners claim that a substantial question is involved in this case, namely the right of a state or subdivision thereof, to levy a tax on a trust fund held jointly by two trustees merely because one trustee happens as an individual to be a resident of the taxing state (1) when the intangible trust property is not in the taxing state or subdivision thereof and never has been; (2) when the trust is created

by a will of a non-resident and administered in and under the laws of another state; (3) when the beneficiary is a non-resident and (4) when the co-trustee is also a non-resident.

Anthony v. *Caswell*, 15 R. I. 159 (1885);
State Tax on Foreign Held Bonds, 15 Wall. 300;
Union Transit Co. v. *Kentucky*, 199 U. S. 194;
Frick v. *Pennsylvania*, 268 U. S. 473-488;
R. I. Hospital Trust Co. v. *Doughton*, 270 U. S. 69;
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83, (50 S. Ct. Reporter 59);
Utah v. *Aldrich*, (1942) 316 U. S. 174, 62 S. Ct. 1008.

The State of Rhode Island has not extended benefits or protection to this trust fund and therefore a substantial question is involved as to its right to tax the petitioner George H. Warren, Jr., as trustee.

Respectfully submitted,

(S.) William R. Harvey.
(S.) William Greenough.

EXHIBIT A

AND, on the 21st day of February, A. D. 1945, there was filed in the office of the Superior Court in said County of Newport, in said State of Rhode Island, the following:

Rescript

Sullivan, J. Heard on Respondent's motion to strike out the name of William B. Greenough as one of the petitioners, because of misjoinder of parties; that said Greenough is not aggrieved by any tax assessed against him, as trustee, because the assessment is against George Henry Warren, Jr., trustee, and that said Greenough is not assessed; and that said William B. Greenough, trustee, is not a "person aggrieved on any ground whatsoever by any assessment of taxes against him," Ch. 31, Sec. 14, General Laws 1938, and that he is improperly joined as a petitioner.

The facts in this motion are not in dispute. The Chairman of the Board of Tax Assessors testified as to the imposition of a tax against George Henry Warren, Jr., a resident of Newport, R. I., under the will of George Henry Warren, Sr., who died a resident of New York, on intangibles for the benefit of Constance Whitney Warren, on one-half of the property held in trust. The assessment was made by virtue of Subsection 5 of Section 9, Chapter 30, General Laws, 1938. The trust estate of $25,000 was held jointly by said Warren and by said Greenough, a resident of the State of New York. The tax of $50 was paid under protest by the trustees, which they seek to recover back by virtue of Section 14 of Chapter 31, General Laws 1938, on the ground that the assessment was illegal, void and unconstitutional.

Section 14 of Chapter 31, General Laws 1938, which gives to "any person aggrieved on any ground whatsoever by any assessment of taxes against him" etc. is a remedial statute and must be liberally construed. See cases under Workmens' Compensation Act, Vols. 54, 61 and 65 R. I. There can be no question but that the tax is assessed against the fund. This was so held in Clarke vs. Addelman, 26 R. I. 168. Section 4 of Chapter 486, General Laws, vests in co-

trustees "title to all of the trust estate." See Edwards vs. Cardarelli, 65 R. I. 236, where the Court said: "A guardian, unlike a trustee * * * does not take legal title to his ward's personal property." Here, Warren and Greenough were appointed co-trustees to administer the estate in question; and in the case of Angel vs. Moni, 45 R. I. 186, it was held that "any action depending on the exercise of judgment or discretion on the part of the trustees requires the joint action of all." See Kramme v. Newshaw, 147 Md. 535, 128 Atl. 468. Also, Donovan vs. Miller, 112 At. 926 (Md.)

Now under the well-established principles of law concerning the assessment of taxes being against the fund, the joint ownership of the legal title of the fund by the trustees, the indivisibility of the res constituting the estate and the duty of the trustees to act collectively, the only question remaining is whether said Greenough is a party "aggrieved on any ground whatsoever."

The court in Tillinghast vs. Brown, 24 R. I. 179, a probate appeal, states the rule to be that,

> "A party is aggrieved by the judgment or division when it operates on his rights of property or bears directly on his interest."

The word "aggrieved" refers to a substantial grievance, the denial of some personal property right or the imposition upon a party of a burden or obligation.

A party aggrieved is one whose pecuniary interest is directly affected by the decree; one whose right of property may be established or divested by the decree; and, quoting from Lawless vs. Regan, 128 Mass. 592:

> "In order to have a right of appeal from the judgment of the Court, it must appear that the party appealing has some pecuniary interest or some personal right which is immediately or remotely affected or concluded by the decree appealed from."

See *Roullard* vs. *McSoley*, 54 R. I. 232, at 234 R. I. *Hospital Trust Co.* vs. *Hopkins*, 38 R. I. 59, at 69.

Hamilton Mfg. Co. vs. *City of Lowell*, 274 Mass. 477, 175 N. E. 73.

The Hamilton Manufacturing Co. case is a tax case where the Court held that a person aggrieved "means one whose pecuniary interests are or may be adversely affected."

The respondent contends that to allow said Greenough to continue as a petitioner will tend to becloud the issue, embarrass the respondent and confuse the Court. The Court cannot follow this reasoning against the rights which said Greenough has as a co-trustee of the fund, a part of which is being assessed. Under the provisions of the remedial Statute, Section 14 of Chapter 31 of the General Laws, 1938, it would seem to the Court that he falls within the rule of a person "aggrieved." At the most, if his name is allowed to remain as a petitioner, and if he is not entitled to become a party, it is mere surplusage; and if his name is stricken out and he is not entitled to petition the Court for redress under the statute, it is a most serious matter, as he has been denied his constitutional right.

For the above reasons, the motion to strike out is denied.

EXHIBIT B

AND, on the 25th day of April, A. D. 1945, there was filed in the office of the Superior Court in said County of Newport, in said state of Rhode Island, the following:

Decision

SULLIVAN, *J.*:

Heard on prayer of Petitioners for relief from tax assessment under the provisions of Sec. 14, of Chapter 31, of the General Laws, 1938. The facts set out in the petition are not in dispute and show briefly that George Henry Warren, a resident and citizen of New York, died June 3, 1943, leaving a will, which was duly admitted to probate in New York, and letters testamentary were issued to the Petitioners

June 30, 1943, they being the executors named therein; that a copy of said will was filed in the Probate Court of Newport and letters testamentary in Rhode Island were issued to said Petitioners. Then comes the recital of the fifth and sixth clauses of the will giving to the executors and trustees named in said will Four hundred thousand dollars in trust for the benefit of testator's daughter, Constance Whitney Warren, for life. Paragraph sixth provides for a further addenda of Two hundred thousand dollars to be added to the original trust on the same terms and conditions; that said Greenough and Constance Whitney Warren are both residents of New York, while George Henry Warren, Jr., the other trustee, is a resident of Newport; that the whole of the trust estate is now and has at all times been located in the City, County and State of New York; that the Respondents assessed George Henry Warren, Jr., upon intangible personal property held in trust by said Petitioners as trustees, on June 15, 1944, for the benefit of Constance Whitney Warren, described in paragraph 2 of said petition as follows:

> Warren George H., Jr., Trustee, U. W. of George H. Warren, Intangible Personal Property $12,500, Tax $50.

This tax was paid under protest and the Petitioners contend that said assessment is illegal, unconstitutional and void; (1) Because the property assessed was owned by a non-resident testator and was located in the State of New York and never located in Rhode Island; (2) Because the beneficiary for life and one of the trustees are residents of New York; (3) Because said trust fund is held by said trustees as joint tenants, their interest in said fund being not severable or divisible and their powers must be exercised as a unit; (4) Because Petitioner Warren, as a resident of Rhode Island, does not as trustee exercise his powers as trustee in Rhode Island and enjoys no protection or profit from this State; (5) Because said trust fund, on which said tax was assessed, is subject to the payment of the New York Income Tax, thereby resulting in double taxation; (6) Because Sub-section Fifth of Section 9, of Chapter 30, General Laws, 1938, under which said tax was levied is unconstitu-

tional and in violation of Article V of the Amendments of the Constitution providing that no State "shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction equal protection of the law;" (7) Because Sub-section Fifth of Section 9, of Chapter 30, of General Laws, 1938, and said tax levied against Petitioners is unconstitutional under provisions of Section 16, of Article 1 of the Constitution of Rhode Island, providing that no property shall be taken for public uses without just compensation.

The petition concludes with the prayer that said tax be declared illegal, unconstitutional and void; that judgment be given for the amount of the tax paid with penalty, interest and costs.

The Petitioners substantiated their allegations of fact by calling the Chairman of the Board of the Tax Assessors, the Clerk of the Probate Court of Newport and one of the Petitioners, William Greenough, an attorney of the New York Bar, who qualified as an expert and testified to the law of the State of New York on taxation applicable to the facts in this case. The Chairman of the Board of the Tax Assessors was recalled by the Respondent and gave testimony as to further information he had received regarding the trust estate and value of the same.

The question raised by the petition, the plea and the evidence is purely one of law, no material fact being in dispute. In support of Petitioners' Contention, they have submitted for the Court's consideration the cases of *Goodsite* vs. *Lane*, et als., 139 Fed. 592; *Newcomb* vs. *Page*, 113 N. E. 458 and *In re Dorrance Will*, 3 At. 2nd. 682. These cases have much persuasive force but the issue raised in this case by the pleadings is whether the Statute under which the assessment was made is constitutional. In the case of *Payne & Butler* vs. *Providence Gas Company*, 31 R. I., 295 at page 313, the Supreme Court said:

> "There is only one body that is authorized to interpret the statutes of this State with the view of determining their constitutionality. Under article XII of the amendments to the constitution of the State, adopted in November, 1903, section 1: 'The supreme court shall

have final revisory and appellate jurisdiction upon all questions of law and equity.' Furthermore, a statute is constitutional or not, as the case may be, without reference to the interpretation of any board or boards of commissioners. It is deemed to be constitutional until this court shall have decided that it is not."

In the case of *Fritz vs. Presbrey* et al., 44 R. I. 207, our Court quoted from the East Shore Land Co. *vs.* Peckham, 33 R. I. 541, as follows:

" 'All statutes are presumed to be valid and constitutional and the burden of proving the unconstitutionality of any statute is upon the party raising the question; furthermore, the rule is that he must prove it beyond a reasonable doubt.' "

The Court, a little further on in the same case, quotes from Wellington et al., Petitioners, 16 Pick. 87 from the opinion of Chief Justice Shaw as follows:

" 'When called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give the force of law, courts will approach the question with great caution, examine it in every possible aspect and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void unless the nullity and invalidity of the act are placed in their judgment beyond a reasonable doubt.' "

The assessment in question was made in strict compliance with Sub-section Fifth, of Section 9, of Chapter 30, of the General Laws, 1938, and there is nothing in the proof offered to justify the Court in saying that the tax assessors deviated in one iota in this assessment from the law as laid down in the above-mentioned statute. The petition is therefore denied.

EXHIBIT C

AND, on the 31st day of May A. D. 1946, there was filed in the office of the Supreme Court in County of Providence and said State of Rhode Island the following:

OPINION

BAKER, *J.*

This is a petition for relief from the assessment of a tax and is brought under general laws 1938, chapter 31, #14. The petitioners are seeking to recover the tax heretofore paid by them under protest, the basis of their petition being that the tax in question was illegally and unconstitutionally assessed against one of them. The matter was heard in the superior court by a justice thereof sitting without a jury. He rendered a decision denying and dismissing the petition. A bill of exceptions containing two exceptions, one to the decision and another which is not now pressed, was thereafter prosecuted to this court by the petitioners and is now before us for consideration.

The evidence shows the following pertinent facts, among others. The petitioners, William Greenough and George Henry Warren, Jr., are the duly qualified executors and cotrustees under the will of George Henry Warren, who died June 3, 1943 and who was a resident of the city of New York. That will was duly admitted to probate by a decree of the surrogate's court of the county of New York entered June 30, 1943, and letters testamentary were issued to the petitioners. A copy of the will, authenticated under the act of Congress, was also ordered filed and recorded, and letters testamentary in Rhode Island were issued to the petitioners by a decree of the probate court of the city of Newport in this state entered November 15, 1943.

Under the fifth clause of the will the petitioners were bequeathed the sum of $400,000 to be held by them in trust to pay the net income therefrom, in the first instance, to the testator's daughter Constance Whitney Warren for and during her natural life. The clause then contained

other and further provisions respecting said sum and the income therefrom in the event of the taking place of certain contingencies not now material to the issues before us. By the sixth clause of the will the testator also bequeathed to the petitioners the further sum of $200,000 "in augmentation of and to be added to the principal of the trust created by the fifth clause of this my will for the benefit of my daughter Constance Whitney Warren to be held and disposed of by them upon the same terms and conditions as set forth in said fifth clause".

Further, it appears from the evidence that the testator's daughter, Constance Whitney Warren is a resident of the state of New York; that the petitioner and trustee William Greenough is likewise a resident of that state; but that the petitioner and trustee George Henry Warren, Jr. is a domiciled resident of the city of Newport in this state. It is not disputed that at the time of the death of the testator and on June 15, 1944 at 12 o'clock noon, which was the time of the assessment of the tax involved in this proceeding, and at all times up to the hearing in the superior court, all of the intangible personal property constituting the principal of the above-mentioned trust fund was located in the city of New York and never has been located in this state.

It is admitted that the tax in question was assessed by the respondents under the provisions of G. L. 1938, chap. 30, §9, subsec. fifth, which is as follows: "Intangible personal property held in trust by an executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator, or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee resides; and if there be more than one such executor, administrator, or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

According to the evidence a tax of $50 for the fiscal year 1944 to 1945 appears on the assessment roll of the city of Newport as follows: "George H. Warren junior, trustee

under will of George H. Warren for Constance W. Warren, assessment of $12,500, intangible personal property". The uncontradicted evidence shows that, according to information given the tax assessors of Newport, prior to the above assessment, by an attorney at law representing the trustee George Henry Warren, Jr., $12,500 was one half of the sum held by the trustees on the date of the assessment as the then *corpus* of the aforesaid trust created under the fifth and sixth clauses of the testator's will.

The respondents argue that the petition was correctly denied and dismissed by the superior court because it could not properly be brought in its present form under #14, and also because the petitioners were not entitled to recover the tax which they had paid, in view of the facts appearing in evidence respecting the nature of such payment. These defenses were not set out by the respondents in any of their pleadings, were not brought to the attention of that court and apparently are raised for the first time in argument before us. Because of our ultimate disposition of the present petition, it is not necessary for us to pass upon the above questions and we shall, for the purposes of this case only, assume that the petition is properly brought and that the petitioners are not prevented from recovering the tax in question merely by reason of the evidence relating to the manner of its payment.

In support of their position, the petitioners contend that, properly construed subsec. fifth of #9 has no application to the facts and circumstances disclosed by the evidence, and therefore that the tax appearing on the assessment roll of the city of Newport, as hereinbefore set out, is illegally assessed and is void. The petitioners also make the further argument that if the above statute is held to be applicable, then it is unconstitutional under Section 1 of article XIV of the amendments to the Constitution of the United States and under sec. 16 of art. I of the constitution of this state.

On the other hand, the respondents maintain that the only question for this court on the present record is the constitutionality of subsec. fifth of #9 under the above-mentioned provisions of the Constitution of the United

States and the constitution of this state. They urge that the question of the applicability of the state statute was not before, and was not decided by, the superior court and is not properly before us.

While the record of the hearing before the superior court is not as clear and definite on that issue as is desirable, nevertheless we have come to the conclusion that such question was before that court and was decided by it adversely to the petitioners. After testimony had been taken setting out the material facts, the trial justice filed a rescript which ended in the following language: "The assessment in question was made in strict compliance with Sub-section Fifth, Section 9, of Chapter 30, of the General Laws, 1938, and there is nothing in the proof offered to justify the Court in saying, that the tax assessors deviated in one iota in this assessment from the law as laid down in the above-mentioned statute."

If this language cannot properly be construed as a finding that the statute was applicable, then in our opinion the trial justice was making no finding whatever since he showed in his rescript that he was aware that he had no authority to pass on the constitutionality of such statute, and no facts were in dispute. In our judgment we should not assume that he was filing a meaningless rescript. The only issue therefore on the present record which the superior court had jurisdiction to decide involved the applicability of the statute in question.

Whether or not subsec. fifth of 9 is applicable to the facts of the instant case merits careful consideration. We find nothing in the express provisions of the clause which in our opinion prevents its applicability. There is, at least, a direct authorization to the taxing body to impose a tax on the intangible personal property held by any resident trustee, and a direction as to the place and manner of levying such a tax. The language used is simple and without ambiguity. The subsection is broad in its scope and there are no express exceptions or words of limitation employed. Resident trustees of trust originating in another jurisdiction are not specifically or by implication excluded from the operation of the subsection. In fact, the general assembly, in our

opinion, has in the statute shown its intent that intangible personal property, wherever located, when in the possession of such resident trustees, is taxable in this state according to the terms thereof. Unquestionably in such matters the policy of the law is controlled and fixed by the legislative not the judicial branch of the state government.

The petitioners do not question the fact that the letter of the statute was followed by the respondents in assessing the tax involved here. The statute in substantially its present form has been construed by this court in several cases. See *Anthony v. Caswell,* 15 R. I. 159; *Ailman & Honey, Petitioners,* 17 R. I. 362. In the first of these the court held that the provisions of a statute in the language of the statute now before us did not permit a *nonresident* trustee, who had no property in this state, to be taxed in the town in this state where his *cestui que* trust resided.

In the second of the cases, however, the court upheld the tax assessed in Newport against the trustee there resident, who held in trust mortgages on real estate in Newport, but who was appointed by a South Carolina court under the will of a deceased resident of that state. The *cestui que* trust who was entitled to the income of the trust estate resided in New York. Perhaps the tax in that case and the applicability of the statute to those facts can be more readily supported than can the tax in the instant case because the trustee in that case had invested part of the trust estate in mortgages in Newport property, to which fact the court specifically referred in its opinion, whereas all the trust estate in the present case is located in New York. However, a careful consideration of the opinion leads us to the belief that in principle it fully supports the position that the taxing statute is applicable to the facts of the case now before us.

For example, in the *Ailman & Honey* case the court used the following language at pages 364, 365: "There is no question of the right of the State to put all property within its jurisdiction under contribution for necessary revenue. * * * In the case before us, the legal owner resides here, and he has invested a part of his trust estate here; so that the situs of the property is doubly fixed. The fact that the

authority of the trustee comes from another State does not change the fact of his residence and legal title within this State; nor the fact that the property taxed is here, by reason of its investment in loans secured by mortgages within this State, which run to the trustee." (italics ours)

The court thus clearly holds that the fact that the trustee, the legal owner of the trust property, resides in this state fixed here for our tax purpose the *situs* of the trust property held by him in so far as intangible personal property is concerned. It is well settled that ordinarily a trustee is considered for taxation purposes to be the owner of the property which he holds in trust. The court so held in *Anthony v. Caswell, supra*, saying, at page 161: "The statute, following the common rule, clearly recognizes executors, administrators, and trustees as the owners, for the purposes of taxation, of the property held in trust by them." The *situs* of intangible personal property for the imposition of a tax is at the domicile of such owner. *Edwards v. Cardarelli*, 65 R. I. 236.

We find, therefore, that, aside from any question of constitutionality the provisions of subsec. fifth of #9 are applicable to the facts of the instant case, and that the tax assessed against George Henry Warren, Jr. as trustee is to that extent valid and is not beyond the scope and authority of the statute.

Since this issue of applicability is largely governed, at least as far as we are concerned, by the principles laid down in our own cases as above indicated, it ordinarily would not be necessary to discuss authorities from other jurisdictions. The petitioners, however, have cited several cases upon which they strongly rely and we will refer to certain of them briefly. In these cases, on facts somewhat similar to those in the present case, it was held that the tax under consideration was improperly assessed. In our opinion they are distinguishable from the case now before us.

In *Newcomb v. Paige*, 224 Mass. 516, the court applied the principle of interstate comity and also found, at page 519, that a particular sentence in the Massachusetts taxing act "is some indication of a legislative purpose that a trust fund lawfully within the taxing jurisdiction of another

State and there making a just contribution to the support of government, should not be made liable to another tax here." In the present case we perceive no indication of any such legislative purpose in our own act but, as we have stated, find from its language a directly contrary intent. In the *Ailman & Honey* case this court said, at page 364, referring to the trust fund before it: "If it be thus liable to double taxation, here and elsewhere, that has to do with the policy of the law, over which we have no control."

In *Dorrance's Estate*, 333 Pa. 162, the court in arriving at its decision, construed the language of the taxing statutes, in respect to the ownership, holding or possession of trust property, narrowly and also pointed out that the statute contained no provision for dividing such trust property among resident and nonresident trustees for the purpose of assessing the tax. Our statute, on the other hand, has a specific provision allowing proportionate taxation as to resident trustees.

Harrison v. Com'r. of Corps. & Taxation, 272 Mass. 442, involved the imposition of the Massachusetts income tax on trust estates originating and administered outside of that state, certain of the trustees, however, being residents therein. In refusing to allow the tax the court, at page 428, stated: "The principle, that the situs of intangible property held in trust, in the absence of other controlling factors follows the person of the trustee, becomes inapplicable because by a dominating law its situs is fixed in the place where the testamentary trust was created and established and is being administered under direction of its court. For all purposes incident to the cases at bar, its situs is immovably established within the State where the testamentary trust of which it is a part is being administered." Such a holding in our opinion appears to be contrary in principle to the views already expressed by this court and so understood cannot be followed by us. We find no controlling factor which takes the instant case out of the general rule respecting the *situs* of intangible personal property held in trust.

The petitioners also advance the argument that subsec. fifth, #9, should not be applied to the facts of this case because under the law of New York trustees have title to

the trust property as joint tenants and must act as a unit in administering the trust. Although this fact is referred to in support of the decision in some cases, particularly in Massachusetts, we do not understand why it should, in and of itself, prevent the imposition by this state of a tax under subsec. fifth, #9, other requirements of that statute being complied with. The fact that such is the law in New York, where this trust was created, should not in our opinion be held to alone prevent the imposition of a tax by this state, if assessed on persons or property within its jurisdiction, unless such tax is held to be unconstitutional.

Finally, the petitioners contend that if subsec. fifth, #9, is found to be applicable to the facts herein, such clause is unconstitutional as being contrary to the "due process" clause of the constitution of the United States and to sec. 16 of art. I of the constitution of this state, which prevents the taking of private property for public uses without just compensation.

Before we deal with this contention it should be determined whether or not it is properly before us. At the outset it should be noted that in this civil proceeding only the unconstitutionality of an act of the general assembly is brought in question upon the record and that no constitutional question of any other nature or kind is raised. That being so the provisions of G. L. 1938, chap. 545, as amended, apply. Section 1 of that chapter was repealed by P. L. 1940, chap. 941, sec. 1, and #6 of chap. 545 was amended by sec. 2 of chap. 941 to read as follows: "Whenever in any proceedings, civil or criminal, in the superior court or in any district court, prior to the trial thereof on its merits, or upon a motion in arrest of judgment, any question of law shall arise, or the constitutionality of an act of the general assembly shall be brought in question upon the record, which in the opinion of the court, or in the opinion of the attorney-general, if the state be a party to such proceeding, is of such doubt and importance, and so affects the merits of the controversy that it ought to be determined by the supreme court before further proceedings, the court in which the cause is pending shall certify such question or motion to the supreme court for that pur-

pose and stay all further proceedings until the question is heard and determined . . . ."

Under #1 of chap. 545, now repealed, the procedure involving certification of such questions before trial was relatively simple. Upon consideration we are of the opinion that in repealing 1 of chap. 545 and by amending #6 of that chapter as above set out it was not the intention of the general assembly to prevent entirely, in a civil case, the certification of constitutional questions of the kind now before us in instances where a justice of the superior court has refused to exercise his discretion in favor of immediate certification. In our opinion the object of sec. 2, chap. 941, P. L. 1940, was merely to give a justice of the superior court in the ordinary civil proceeding discretion in the matter of certifying to the supreme court such constitutional questions prior to the trial of the case, where previously such certification was mandatory. As we view it, the issue, on a motion to certify under #6 as amended, is merely the time of certification and the refusal to certify immediately is not a final disposition of the motion. In our judgment such a motion when once made, if denied in the first instance, nevertheless remains alive until after the case is fully heard and determined, when it comes before us automatically and without further action, in the event a bill of exceptions or appeal is prosecuted to this court by either party.

While #6 as amended does not expressly provide for the above procedure, nevertheless in our opinion it may reasonably be implied therein in the interest of uniform practice and in the preservation of the right of certification under the above circumstances. Such a procedure in effect would be substantially analogous to that specifically provided for in #2 of chap. 545 in respect to the certification of this kind of a constitutional question in a criminal case. There it is expressly provided that the decision of such question be reserved, that the trial of the case proceed to a determination as if the statute were constitutional, and that then, if the defendant is found guilty, the constitutional question raised is to be certified forthwith to the supreme court.

In the instant case the record shows that prior to the hearing in the superior court a motion was made to certify the constitutional question raised herein to the supreme court. Under our interpretation of the statute, as above set forth, the denial of that motion merely delayed the time of certification until the case came here on petitioners' exceptions after final hearing and decision. The certification of the constitutional question therefore is automatically before us for consideration and decision.

The petitioners admittedly do not claim unconstitutionality on the ground of double taxation. It has recently been held that such taxation is permissible. See *Curry v. McCanless*, 307 U. S. 357; *State Tax Comm. of Utah v. Aldrich*, 316 U. S. 174. The petitioners do urge as a valid ground for their claim that the state renders no equivalent for the tax against George Henry Warren, Jr. as trustee, and renders no protection and extends no benefit to the trust fund. This general test of constitutionality is based by them on the following language used in the majority opinion in *State Tax Comm. of Utah v. Aldrich*, *supra*, at page 181: "In line with our recent decisions • • • we repeat that there is no constitutional rule of immunity from taxation of intangibles by more than one State. In case of shares of stock, 'jurisdiction to tax' is not restricted to the domiciliary State. Another State which has extended benefits or protection, or which can demonstrate 'the practical fact of its power' or sovereignty as respects the shares • • • may likewise constitutionally make its exaction."

The petitioners maintain that in the instant case the above requirement is not met. We are of the opinion that it is. While it is true that nothing appears on the record to show that this state has as yet actually extended any specific benefit to or protection over the resident trustee or the trust fund, other than by the decree of the probate court of Newport hereinbefore mentioned, nothing indicates that the state is not ready, willing and capable of doing so if requested. We know of nothing in our statutes or decisions which is of a discriminatory nature respecting a resident trustee of a trust originating in another state.

Such trustee, in our opinion, would be entitled to the same benefits and protection from the laws of this state as would any other natural person here resident.

But, however that may be, we are satisfied that the state can demonstrate the practical fact of its power or sovereignty over the resident trustee and through him over the trust fund which he holds. In the *Curry* case, *supra*, at page 366, the court states that rights to intangibles "are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. * * * Obviously, as sources of actual or potential wealth —which is an appropriate measure of any tax imposed on ownership or its exercise—they cannot be dissociated from the persons from whose relationships they are derived." And at page 372 the court used the following language: "In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there."

Since a question involving the taxation of trustees and trust funds was raised in the *Curry* case, it is clear that the above general principles respecting intangibles were intended to apply as well to trusts and trustees as to ordinary ownership of that class of property. Further, those principles are stated in such broad and comprehensive terms in the cited cases that in our opinion it was intended that they should apply even though the actual evidences of the intangible property might not be in the taxing state. Thus in the instant case, in our opinion, the residence in this state of the trustee George Henry Warren, Jr. gives it such power and sovereignty over him as trustee that, in proper proceedings, he would become amenable to the laws of this state and to the orders of its courts, and likewise he would be afforded such benefit and protection, as trustee, as could properly be accorded him. In our judg-

ment the above test, when applied to the *constitutionality* of our taxing statute, is therefore satisfied by the facts shown.

A rule is enunciated in *Goodsite v. Lane*, 139 Fed. 593 (1905), cited by the petitioners, to the effect that for a tax on intangibles assessed against a resident trustee to be valid and constitutional he must be exercising his office of trustee within the state and enjoying as trustee privileges of value to the estate for which it is just the estate should pay. This rule, in our opinion, would be difficult of application if it appeared that the resident trustee exercised his office within the state only occasionally, or at different periods during a given year, and frequently that he did not so exercise his office at all. In any event, however, such rule, as we see it, is superseded and is no longer operative, because of the views expressed and the general principles set out by the supreme court of the United States regarding the taxation of intangibles in the recent cases of *Curry v. McCanless* and *State Tax Comm. of Utah v. Aldrich*, *supra*, and others.

We therefore find that subsec. fifth, #9, is not contrary to the provisions of section 1 of art. XIV of the amendments to the constitution of the United States or to sec. 16 of art. I of the constitution of this state, but is valid and constitutional, and that the tax involved herein, under all the facts and circumstances, was properly assessed by the respondents against George Henry Warren, Jr. as trustee. The trial justice did not err in denying and dismissing the petition.

The petitioners' exceptions are overruled, and the case is remitted to the superior court.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 461

WILLIAM GREENOUGH et al, Trustees,
Appellants

v.

TAX ASSESSORS of the Cty of Newport,
Appellees.

Brief in opposition to Appellees' statement of matters making against the jurisdiction of the court and motion to dismiss the appeal.

WILLIAM R. HARVEY
WILLAM GREENOUGH
Counsel for Appellants

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No.

WILLIAM GREENOUGH et al. Trustees
Appellants

v

TAX ASSESSORS of the City of Newport
Appellees

BRIEF IN OPPOSITION TO APPELLEES' STATEMENT OF MATTERS MAKING AGAINST THE JURISDICTION OF THE COURT AND MOTION TO DISMISS THE APPEAL.

PRESENT QUESTION INVOLVED

This brief is filed in opposition to the appellees' motion to dismiss the appeal. The case is upon appeal from the superior court of Rhode Island under Section 344 of Title 28 of the United States Code which is Section 237 of the Judicial Code, on the ground that

there was drawn into question the validity of a statute of the state.

The case below is reported in 47 A. 2nd. 625.

The Appellees' motion contains six points or grounds.

I

The Appellants urge that the motion to dismiss should not be granted for the reasons set forth below.

AS TO GROUND I

All questions presented to the court were decided by it and in such manner that the court's finding on the constitutionality of the statute in question became the controlling factor in the case. The final result and judgment for the defendants was based on the holding that the statute was not unconstitutional. The court has jurisdiction to review this decision on appeal.

State of Indiana ex rel Anderson v. Brand.
58 S. Ct. 443, 303 U. S. 95;

Rogers v. County of Hennepin.
36 S. Ct. 265, 240 U. S. 184;

International Steel Co. v. National Surety Co.
56 S. Ct. 619; 297 U. S. 657;

Commonwealth of Virginia v. Imperial Coal Sales Company. 55 S. Ct. 12, 293 U. S. 15;

Grayson v. Harris. 45 S. Ct. 317, 267 U. S. 352.

AS TO GROUND II

The state court heard the case and decided it on the merits and held that there was no voluntary payment of the tax and that the petition filed by the appellants was the proper way to raise the question decided by the court, namely whether or not the statute brought into question was constitutional when applied to the facts of this case.

Rogers v. County of Hennepin, 36 S. Ct. 265, 240 U. S. 184;

Commonwealth of Virginia v. Imperial Coal Sales Co. 55 S. Ct. 12, 293 U. S. 15;

United Gas Public Service Co. v. State of Texas, 58 S. Ct. 185, 303 U. S. 183.

AS TO GROUND III

This case is a statutory petition for relief from a tax assessment and is the proceeding prescribed by the law of Rhode Island for the relief from an illegal assessment of a tax G. L. Rhode Island, 1938, Chapter 31, Sec. 14:

> "SEC. 14. Any person aggrieved on any ground whatsoever by any assessment of taxes against him in any city or town, may within 3 months after the last day appointed for the payment without penalty of such tax, or the first installment thereof, if such tax be payable in installments, file a petition in the superior court for the county in which such city or town lies for relief from such assessment to which petition the assessors of taxes of said city or town in office at the time such petition is filed shall be made parties respondent. . . .
>
> "*Provided, however*, that in case such person has not filed an account, he shall not have the benefit

of the remedy provided in this section and in sections 15 and 17 of this chapter unless (1) his real estate has been assessed at a value in excess of the value at which it was assessed on the last preceding assessment day, whether then owned by him or not, and has been assessed at a value in excess of its full and fair cash value; or (2) the tax assessed is illegal in whole or in part; and his remedy shall be limited to a review of the assessment on such real estate or to relief with respect to such illegal tax, as the case may be.

"The remedy provided in this section shall be exclusive if the taxpayer owned or possessed any ratable estate at all, except that in a proper case the taxpayer may invoke the equity jurisdiction of the superior court provided the bill in equity is filed within 3 months after the last day appointed for the payment without penalty of such tax or the first installment thereof, if such tax be payable in installments. A taxpayer alleging an illegal or void tax assessment against him shall be confined to the remedies provided by this section. (P.L., 1935, Chap. 2260, amending P. L., 1932, Chap. 1945.)"

There is no requirement that the tax be paid or the property levied upon. The Supreme Court of Rhode Island heard and decided the federal question. Where the state court deems the federal question to be before it and actually decides it adversely to the federal right asserted, this court has jurisdiction on appeal.

The court said in

State of Indiana ex rel Anderson v. Brand, supra,

"Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be

before it, actually entertains and decides the question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment. We cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non federal ground."

Rogers v. County of Hennepin
365 S. Ct. 265, 240 U. S. 184;

Mallinkrodt Chemical Works v. State of Missouri,
35 S. Ct. 671, 238 U. S. 41;

Hancock National Bank v. Farnum,
176 U. S. 640, 20 S. Ct. 506;

North Carolina R. R. Co. v. Zachary,
34 S. Ct. 305, 232 U. S. 248;

Meidreich v. Lauenstein, 34 S. Ct. 309, 232.

Meidreich v. Lauenstein,
34 S. Ct. 309, 232 U. S. 236.

AS TO GROUND IV

The non federal questions were heard by the court and the court disposed of them and then considered and decided the constitutional question which became essential to the final determination of the case.

The instant case presents a perfect situation for the exercise by this court of its power to correct an error of a state court in ruling on a federal question.

See cases cited supra.

AS TO GROUND V

The amount actually involved in this present suit is small but the will shows a very substantial amount to be finally involved. However, the fundamental question upon which the judgment in the cause rested, whether, under the circumstances present in this case, a state has the right to levy a tax on a foreign trust estate when the beneficiary and the co-trustee are residents of the State of New York and the trust res is located in the State of New York, is of the utmost importance. The question is a substantial one.

Buel v. Van Ness, 8 Wheat. 312, 5 L.Ed. 624;
Barry v. Mercein, 5 How. 103, 120, 12 L. Ed. 70;
Weston v. Charleston, 2 Pet. 449, 7 L. Ed. 481;
Holmes v. Jennison, 14 Pet. 540, 10 L. Ed. 579.

AS TO GROUND VI

This is untrue. The cases believed to sustain jurisdiction are cited on page 19 of the statement as to jurisdiction.

The motion to dismiss should not be granted.

Respectfully submitted.

WILLIAM R. HARVEY
WILLIAM GREENOUGH
Attorneys for Appellants

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 461

WILLIAM GREENOUGH and GEORGE HENRY WARREN, Jr., Trustees,

Appellants,

vs.

TAX ASSESSORS OF THE CITY OF NEWPORT; and EDWARD L. LEAHY, Tax Administrator of the State of Rhode Island.

BRIEF FOR APPELLANTS

WILLIAM GREENOUGH,
WILLIAM R. HARVEY,
Attorneys for Petitioners.

L. RUSSELL HAIRE,
WILLIAM R. HARVEY,
WILLIAM GREENOUGH,
SHEFFIELD & HARVEY,
Newport, R. I.
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 461

WILLIAM GREENOUGH and GEORGE HENRY WARREN, Jr., Trustees,

Appellants,

vs.

TAX ASSESSORS OF THE CITY OF NEWPORT; and EDWARD L. LEAHY, Tax Administrator of the State of Rhode Island.

BRIEF FOR APPELLANTS

Opinions Below.

The opinion of the Superior Court of the State of Rhode Island, from which the appeal to the Supreme Court of Rhode Island was taken, appears in the Record at pages 34 to 37. This opinion has not been reported. The opinion of the Supreme Court of Rhode Island (R. 39) is reported in 47 Atlantic Reporter, 2d, 625.

Jurisdiction.

The date of the final judgment of the Superior Court for the County of Newport, in the State of Rhode Island, herein sought to be reviewed, was July 2, 1946 (R. 49). A Petition for Allowance of the Appeal to the Supreme Court of the United States, the Assignments of Error and Prayer for Reversal (R. 50) were presented to the pre-

siding Justice of the Superior Court of the State of Rhode Island on August 7, 1946, and the order allowing the appeal (R. 51) was entered by the presiding Justice of the Superior Court of the State of Rhode Island on August 7, 1946. The jurisdiction of this court is conferred by Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925. This court entered an order noting probable jurisdiction in this case on October 21, 1946 (R. 55).

Questions Presented.

The question in this case is whether, under the provisions of sub-division Fifth of Section 9 of Chapter 30 of the General Laws of Rhode Island of 1938, George Henry Warren, Jr., one of two trustees, is, because he happens as an individual to reside in Rhode Island, liable to be taxed as trustee of a trust on one-half of the intangible property located in and administered solely in New York under the will of his father, a New York resident, for the benefit of a New York resident; his co-trustee, William Greenough, being likewise a New York resident.

Statute Involved.

The statute involved (General Laws of Rhode Island, 1938, Chapter 30, Section 9 Subdivision Fifth) imposes an ad valorem tax as follows:

> "Fifth. Intangible personal property held in trust by any executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee resides; and if there be more than one such executor, administrator or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

The tax assessed is as follows:

"Warren, George H. Jr. Trustee u/w of George H. Warren for Constance Whitney Warren. Intangible Personal Property $12,500. Tax $50." (R. 3, 14)

and was a tax on one-half of the securities (500 shares of Standard Oil Co. of N. J.) held by the trustees. (R. 19, 27)

The trustees, by a check signed by both of the trustees, paid the tax under protest. (R. 32)

Statement.

The undisputed facts are contained in the petition filed in the Superior Court of the County of Newport, Rhode Island, by the appellants herein (R. 1-5), and are as follows:

1. That George Henry Warren, late a resident of the City, County and State of New York, died on the 3rd day of June, A. D. 1943, leaving a last will and testament dated April 19, 1943, and which, by a decree of the Surrogate's Court of the County of New York, entered on the 30th day of June, 1943, was duly admitted to probate, and letters testamentary thereon were issued to your petitioners, the executors named therein; said Surrogate's Court also, on June 30, 1943 granted Letters of Trusteeship (R. 33) to George Henry Warren, Jr. and William Greenough of the trusts created by said will. By a decree of the Probate Court of the City of Newport, in the County of Newport and State of Rhode Island, entered on the 15th day of November, A. D. 1943, a copy of said will authenticated under the Act of Congress was ordered filed and recorded, and letters testamentary in Rhode Island were issued to your petitioners, the executors named therein.

2. That said will provided in Clauses Fifth and Sixth in part as follows:

"I give and bequeath unto my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their

successors the sum of Four Hundred Thousand Dollars in trust nevertheless to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my daughter Constance Whitney Warren, for and during her natural life and upon and after her decease or in the event my said daughter shall die before me then to assign transfer and pay over the said principal sum of Four Hundred Thousand Dollars so held in trust for her as aforesaid or the securities in which the same may then be invested and I give and bequeath the same unto her then living children in equal shares and unto the issue of any child of hers who may have previously died leaving issue then surviving such issue however to take the part or share which his her or their parent would have taken if living per stirpes and not per capita.

"In the event however there shall be no child or children or issue of a deceased child or children of my said daughter then surviving then to hold and continue to hold the said sum of Four hundred thousand dollars upon the further trust to invest and keep the same invested and receive and collect the interest and income derived therefrom and to pay and apply the net interest and income arising therefrom to the use of my son George Henry Warren junior during his natural life, and upon and after his decease then to assign transfer and pay over the said principal sum of Four hundred thousand dollars or the securities in which the same may then be invested and I give and bequeath the same unto his issue per stirpes and not per capita."

"Sixth: • • • I do likewise give and bequeath to my executors and trustees hereinafter named or unto such of them as shall qualify and undertake the execution of this my will and unto the survivor of them and their successors the further sum of Two hundred thousand dollars in augmentation of and to be added to the principal of the trust created by the fifth clause of this my will for the benefit of

my daughter Constance Whitney Warren to be held and disposed of by them upon the same terms and conditions as set forth in said fifth clause."

Said will further provides in clause Sixteenth:

"Sixteenth: I hereby nominate constitute and appoint my son George Henry Warren junior and William Greenough the husband of my niece Charlotte Warren Greenough to be the executors of and trustees under this my will.

"Upon the decease of either my said son or the said William Greenough or in the event either my said son or the said William Greenough shall resign or become for any reason disqualified to act as executor of and trustee under this my will before my estate has been fully administered or the trusts hereby created have been fully executed then I do hereby nominate constitute and appoint United States Trust Company of New York and its successor as executor of and trustee under this my last will and testament.

"It is my will and I direct that no bond or other security shall be required by any surrogate probate court or judge of any court of or from my said executors or trustees under this my will or either of them for the performance of their duties under this my will or on account of the non-residence of any such executor or trustee or either of them." (R. 55)

3. That William Greenough, one of the trustees appointed in and duly qualified as such under said Clauses Fifth and Sixth respectively, is a resident of the State of New York, George Henry Warren, Jr., the other trustee named therein and duly qualified as such is a resident of said City of Newport; that Constance Whitney Warren, the beneficiary for life under said trust is a resident of the State of New York; and that all of the intangible personal property constituting the principal of said trust fund was, at the time of the death of said George Henry Warren, and on the 15th day of June, 1944, at 12 o'clock noon, and at all times since the death of said George Henry Warren was and

is now located in the City, County and State of New York and never has been located in the City of Newport in the State of Rhode Island, and is and always has been beyond the jurisdiction of the State of Rhode Island and has not received or enjoyed any benefit or protection from the laws of the State of Rhode Island.

4. That the trustees of said trust fund hold said trust fund, so located in the State of New York, as joint tenants, and their title and interest in said fund as such joint tenants are not severable or divisible for the purposes of taxation or otherwise, and their powers must be exercised as a unit. (R. 24) Quoting Section 66 of New York Real Property Law as follows:

> "Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be a joint tenancy; but every estate, vested in executors or trustees as such, shall be held by them in joint tenancy. This section shall apply as well to estates already created or vested as to estates hereinafter granted or devised."

5. That George Henry Warren, Jr., as an individual resident in Rhode Island, does not, as trustee, exercise his powers as trustee in Rhode Island, nor does he, as trustee, enjoy any benefits or protection from the laws of Rhode Island.

Specification of Errors to be Urged.

The Supreme Court of Rhode Island erred:

(1) In failing to sustain appellant's contention that the Statute of Rhode Island, held to be applicable, is repugnant to the Fourteenth Amendment to the Constitution of the United States.

(2) In holding that because George Henry Warren, Jr., one of the two co-trustees of the trust, was a resident of Rhode Island, one-half of the trust estate was property in Rhode Island and therefore subject to the taxing jurisdiction of Rhode Island.

(3) In holding that the State of Rhode Island had jurisdiction to impose the tax herein questioned on the sole basis of the legal fiction that the situs of the trust property followed the residence of George Henry Warren, Jr., one of the two co-trustees, in spite of the settled statutory Rule of Property, which prevails both in Rhode Island and New York, that where co-trustees are appointed to administer a trust they hold as joint tenants, form one collective trustee, and are required to act as a unit.

(4) In entering the order affirming the judgment of the Superior Court for the County of Newport.

Summary of Argument.

Appellant's contentions may be briefly summarized by the following propositions:

(1) Rhode Island's *ad valorem* personal property tax on intangible personal property attempts to reach the principal or corpus of securities held by non-resident trustees in another state.

(2) The Supreme Court of Rhode Island in this case held that solely because of the fiction *mobilia sequuntur personam*, the tax situs of one-half of the corpus of the trust was attributable to George Henry Warren, Jr., as a resident of Rhode Island, and that the tax situs of one-half of the securities was Rhode Island.

(3) The entire corpus of the New York trust has its tax situs in New York, and not in Rhode Island.

(4) The tax, having been imposed upon one-half of the corpus which has its situs in New York, violates the Fourteenth Amendment.

ARGUMENT

I. Constitutionality

A.

The application of the above Tax Statute to the facts in this case by the decision of the Supreme Court of Rhode Island is unconstitutional as in contravention of the provisions of the Fourteenth Amendment.

(a) the intangible property of the trust is not within the territorial jurisdiction of Rhode Island; the tax is upon the fund and not upon the trustees;

(b) the fact that George Henry Warren, Jr., one of the co-trustees, is personally in Rhode Island does not make him a trustee in Rhode Island, or make the trust property amenable to the jurisdiction of Rhode Island;

(c) half of the trust property is not owned by George Henry Warren, Jr. as trustee, it being the rule of law both in Rhode Island and New York that trust property held by two or more trustees is jointly owned, and that the trustees must act as a unit;

(d) as admitted by the Supreme Court of Rhode Island, nothing appears on the record to show that Rhode Island has as yet actually extended any specific benefit to or protection over the resident trustee or the trust fund. (R. 47) The potential willingness of the Rhode Island courts to afford benefit and protection in the future is not sufficient to render the imposition of the tax here controverted free from the prohibition of the Fourteenth Amendment.

Petitioners do not claim unconstitutionality on the ground of double taxation. Their claim rests on the prin-

ciple that the State of Rhode Island renders no equivalent for the tax to George Henry Warren, Jr. as trustee and the state renders no protection and extends no benefit to the trust fund.

A state may not tax property which is not within its territorial jurisdiction.

Anthony v. *Caswell*, 15 R. I. 159;

State Tax on Foreign Held Bonds, 15 Wall. 300;

Union Transit Co. v. *Kentucky*, 199 U. S. 194;

Frick v. Pennsylvania, 268 U. S. 473-488;

R. I. Hospital Trust Co. v. *Doughton*, 270 U. S. 69;

Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83 (50 S. Ct. Reporter 59).

In the early case of *Anthony* v. *Caswell*, 15 R. I., 159 (1885), where the *cestui que* trust resided in Rhode Island, but the trustee resided in New York, and the trust fund was not in Rhode Island, the court held that the tax against the New York trustee in the Town of Jamestown, Rhode Island, where the beneficiary resided, was illegal. In construing this statute the court said:

> "The provision, taken literally, extends to trustees wherever resident, and to property wherever situated, if only the cestuis que trustent reside in this state. The statutes, however, must be understood to extend only so far as they are operative, namely, to persons and things within the State, or to persons subject to the jurisdiction of the State by reason of their domicil. An inspection of our statutes will show that they do not in express terms limit their own operation to the State, the limitation being implied as a matter of course. . . . Our conclusion is, that the purpose of Section 12 is simply to determine where property held in trust shall be taxed, not to extend the liability to taxation."

In reaching this conclusion the court expressed and followed a fundamental rule of statutory construction that no

legislation is presumed to operate outside the territorial jurisdiction of the state or country enacting it. To the contrary, the presumption is that the statute is intended to have no extra-territorial effect, but to apply only within the territorial jurisdiction of the state or country enacting it and an extra-territorial effect is not to be given to statutes by implication (50 American Jurisprudence, Tit. Statutes, Section 487, and cases cited).

A similar tax statute imposing an *ad valorem* tax on intangible personal property was passed upon by the Supreme Court of Massachusetts.

In *Newcomb* v. *Paige*, 224 Mass. 516; 113 N. E. 458 (1916), where the testator resided in New York, and created a trust of intangible personal property naming three trustees, one of whom only had a residence in Massachusetts. The trust res was in New York and never in Massachusetts. The beneficiary resided in New York and the estate was administered there.

The Massachusetts tax act was as follows:

> "St. 1909, c. 490, pt. 23: 'Fifth, Personal Property held in trust by * * * trustee, the income of which is payable to another person, shall be assessed to the * * * trustee in the city or town in which such other person resides, if within the commonwealth; and if he resides out of the commonwealth it shall be assessed in the place where * * * trustee resides; and if there are two or more * * * trustees residing in different places, the property shall be assessed to them in equal proportions in such places. * * * If the * * * trustee is not an inhabitant of the commonwealth, it shall be assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to * * * trustee under a testamentary trust in any other state.' "

The Court held that the Massachusetts tax act did not apply to the trust fund, saying at page 517:

> "This trust fund was invested in intangible securities, a part of which are not subject to direct taxation

in the state of New York, and a part of which are so subject to taxation, and as to this part a tax was paid in that state for the year 1911. So far as taxable the fund as a whole is there subject to taxation. All the securities, documents and other evidences respecting the trust at all times since the creation of the trust have been kept physically in New York in the exclusive custody and control of the trustee there resident, by concurrent assent of all the trustees. *Under the law of the state of New York the trustees must act as a unit and all power possessed by them must be exercised by them as a body;* and the trust fund still forms a part of the estate of the testator, and if the trust should fail for want of takers, the property would become vested in the Supreme Court of New York to be distributed according to law. The law of New York relative to the taxation of personal property kept within that state in the hands of executors and trustees appointed by the court of that state is in substance that when "the will of a deceased resident of New York appoints as executors and trustees a resident of the state of New Jersey and two residents of the state of New York, the amount of an assessment for personal property under the control of the executors and trustees in the state of New York is not by reason of the nonresidence of the third executor and trustee limited to two-thirds of the amount of such personal property," but extends to the whole. People ex rel. Farmers' Loan & Trust Co. *v.* Wells, 94 App. Div. 463, 465, 87 N. Y. Supp. 745, 88 N. Y. Supp. 113, affirmed in 179 N. Y. 566, 71 N. E. 1136. We interpret this statement of the law of New York to mean that all personal property held by executors and trustees appointed by the courts of New York acting within their jurisdiction and actually situated in the state of New York is taxable there in case such property is held by executors or trustees one or more of whom reside in the state of New York and one or more of whom reside in another state. People ex rel. McHarg *v.* Gaus, 169 N. Y. 19, 61 N. E. 987." (Italics inserted.)

And the Court further said at page 519:

> "The provisions of clause 5 of § 23 of the tax act, read in the light of the entire act and of the general principles of law as to taxation, do not subject to a property tax here personal property held by several trustees, only one of whom is a resident of this Commonwealth, under appointment of the court of a sister State of the Union by virtue of the will of a testator resident in that State, to be executed according to its law and actually deposited and continuously kept in such foreign State in the hands of a co-trustee there resident, where it is subject to taxation and a tax there is paid on its account. The final sentence of the clause, to the effect that when the trustee is not a resident of this Commonwealth, the fund shall be 'assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to . . . trustee under a testamentary trust in any other State,' is some indication of a legislative purpose that a trust fund lawfully within the taxing jurisdiction of another State and there making a just contribution to the support of government, should not be made liable to another tax here."

The case of *Newcomb* v. *Paige* (*supra*) was decided in 1916 and the quoted statement of the New York Tax Law was correct at that time. However, all taxes on personal property, tangible or intangible, and whether owned by a resident or a non-resident of New York, were repealed in 1933. The Legislature had previously enacted a tax on the income of property (Laws of 1919, Chapter 627, as amended).

Under Section 3 of Article XVI of the Constitution of the State of New York, adopted November 8, 1938, intangible personal property shall not be taxed *ad valorem*, and intangible personal property within the State not employed in carrying on any business by the owner shall be deemed to be located at the domicile of the owner (if a non-resident), and if held in trust, shall not be deemed to be located in New York for purposes of taxation because of the Trus-

tee being domiciled in New York, unless the income of a non-resident of New York is the product of a New York business, or of New York real or tangible personal property. Such income of intangible personal property of a non-resident is not subject to the New York State Income tax (*People ex rel. Monjo* v. *State Tax Commission*, 218 App. Div. 1).

There are several other closely reasoned cases dealing with this subject. First, the case of *Lewis* v. *The City of Chester*, 60 Pennsylvania State Reports 325. In this case Jones of the City of New York died in 1852 leaving two children and a widow, Sarah J. Lewis. His will under which he appointed his widow executrix was proved before the Surrogate of the City and County of New York. Letters testamentary were granted to Mrs. Lewis and in 1855 she settled the final account of her administration of the estate in the Office of the Surrogate. The executrix was, by the decree on the accounting, ordered to keep a balance of the property invested and retain the same on trust pursuant to the trusts in the will.

The children lived with their mother since the decease of the testator in the Borough of Westchester, Pennsylvania, and a guardian ad litem was appointed by the Surrogate to attend to their interests as often as accounts of the defendant of the funds in her hands had been presented. All of the funds in the estate consisted of United States Bonds, Pennsylvania State Stock, Philadelphia City Bonds and certain moneys loaned on bond and mortgage in Pennsylvania and in Delaware and Maryland. The court below held that the defendant was liable for the entire assessment in the County of Chester. The Supreme Court held that to reach the trustee it must be shown that she was amenable as trustee for something she holds that our law can reach in her hands. • • • "As executrix and trustee under the law she derived all her power from the will and the laws of New York and none whatever from Pennsylvania. • • • It seems to be clear, then, as argued by the plaintiff in error, and on the authorities cited, that the administration and the control and distribution of the

trust estate, belongs wholly to the law and to the authorities of New York. * * * As *Trustee* by virtue of her office of executrix, Mrs. Lewis is unknown to our law; while Pennsylvania has neither the wish nor the power to interfere with anything within the exclusive jurisdiction of New York." After holding that as to the money invested on mortgage in Pennsylvania, the trustee clearly held her investment not by the law of New York but by a personal contract protected solely by the Pennsylvania law and that as to such contract which characterized her as a trustee in fact by her own act and drew to it the protection of Pennsylvania law. To this extent only she was liable to taxation as the price she must pay for the privilege.

In *Dorrance's Will*, 3 Atlantic Reporter, 2nd Series, 682; 333 Pa. 162; 127 A. L. R. 366, the Supreme Court of Pennsylvania dealt with a similar situation in January, 1939, laying down three fundamental propositions:

> (1) When the administration of a trust is vested in co-trustees, they all form but one collective trustee, and they must, therefore, execute the duties of office in their joint capacity;
>
> (2) Where the legal title to intangible personalty was in four trustees, three of whom were Pennsylvania residents, the fourth being a corporate trustee not engaged in business in Pennsylvania, and the trustees held the trust property as a unit in New Jersey, the trust property was not subject to a tax under a statute authorizing a tax on personalty held or possessed by any resident in his own right or as trustee;
>
> (3) Unless property is clearly within a taxing statute, it is not taxable.

The opinion shows that the Department of Revenue of the State of Pennsylvania assessed a personal property tax against intangible personal property held by four trustees appointed by the will of John T. Dorrance who died in 1930 in New Jersey. The assessment was on three-

quarters of the total value of the taxable property because three of the four trustees resided in Pennsylvania. It appeared that the property was evidenced by identified documents which were kept in New Jersey and that the trust was administered as a unit in that State according to its laws. It further appeared that none of the duties of the trustees was performed in Pennsylvania. Of the beneficiaries of the trusts one was a resident of New Jersey, another a resident of California, another a resident of Rhode Island, and four were residents of the State of Pennsylvania. The Court said at page 686:

> "The statute authorizes a tax on personal property owned, held or possessed by any resident in his own right or as trustee. The legal title to the property assessed is not in any resident of Pennsylvania but in the four trustees, one of them, the corporate trustee, not engaged in, and having no right to engage in business in Pennsylvania. They hold the trust property as a unit in the State of New Jersey. The ownership, holding or possession of the trust property is therefore not within the words of the statute; it contains no provision for dividing such trust property among resident and non-resident trustees for purposes of this tax. The taxing officers realize that the facts presented show a case that is not within the words of the statute but endeavor to bring the property within its provisions by construing it as if the legislature had said that in the case of resident and non-resident trustees a proportionate part should be taxed here. In so construing the statute, we think, for various reasons, that the taxing authorities and the learned court below reached a result which the statute does not allow. The familiar rule is that unless property is clearly within a taxing statute, it is not taxable. Arbuckle's Estate, 324 Pa. 501, 505, 188 A. 758."

In *Hutchins et al. Trustees* v. *Long, Commissioner of Taxation*, 272 Mass. 422; 172 N. E. 605, 71 A. L. R. Ann. 677 (1930), involved the Massachusetts income tax, which the Court held is a tax on *property* and not an excise tax.

The opinion of the Supreme Court of Massachusetts was delivered by Rugg, *C. J.*, and involved three cases of testators domiciled outside Massachusetts. In the first two cases each testator died a resident of New York. The two trustees in the first case are residents of Massachusetts. Two of the three trustees in the second case are residents of Massachusetts and the other a resident of Connecticut. In each of these two cases it is alleged that the trustees were appointed by the appropriate court of the State of New York, that under the laws of the State of New York said trust, having been created by the will of a resident of New York and proved and allowed in a court of that state, is a resident trust, and the trustees irrespective of the places of their residence became liable to the State of New York for an income tax on the gains and profits here sought to be taxed, that the gains taxed by the defendant were subject to taxation in that state and that taxes thereon have been assessed and paid, that the trustees, regardless of their residence, are accountable for the administration of their trusts to the courts of New York and are required by the law of New York *to act as a unit in holding, owning and dealing with the property of the trust.* • • • In no one of the complaints is there an allegation as to the place where the trust property is physically kept.

The tax law in question was General Laws, Chapter 62, Section 10, which provided:

> "The income received by estates held in trust by trustees, any one of whom is an inhabitant of the commonwealth • • • shall be subject to the taxes assessed by this chapter to the extent that the persons to whom the income from the trust is payable, or for whose benefit it is accumulated, are inhabitants of the commonwealth." (p. 681)

The court then went on to say that:

> "The first sentence of the section renders subject to the tax such income received by resident trustees or by trustees appointed by a court of this Commonwealth as is payable to or accumulated for the benefit

of inhabitants of this Commonwealth. Residence of the beneficiary within the Commonwealth is made the basis of the tax imposed by this sentence." * * * (p. 681)

Examination of the history of the parts of section 10 does not disclose any legislative purpose to make exceptions to its general phraseology. That section indicates an intention on the part of the General Court to tax all the income there described which is within its power to tax. It is as broad as the jurisdiction of the Commonwealth.

"The language of section 10 is broad enough to include taxation on income in the circumstances here in issue: 'But it is a rule of law that a statute which would be unconstitutional as applied to a certain class of cases, and is constitutional as applied to another class, may be held to have been intended to apply only to the latter class, if this seems in harmony with the general purpose of the Legislature.' KNOWLTON, *C. J., Attorney General* v. *Electric Storage Battery Co.*, 188 Mass. 239, 241, 74 N. E. 467, 468, 2 Ann. Cas. 631; *W. & J. Sloane* v. *Commonwealth*, 253 Mass. 529, 534, 149 N. E. 407, and cases cited. * * *

The allegations of the complaints in the first two cases, as we interpret them, show that the laws of New York establish the situs of the trusts for the purposes of taxation in that State. The averments that in the circumstances disclosed the trusts were 'resident trusts' in that State, *that the trustees, regardless of their residence, are subject to taxation in that State for the same gains as have been here taxed, that they have been taxed therefor and have paid that exaction, and that the trustees are required to act as a unit in holding, owning and dealing with the trust property, are sufficient to require the conclusion that by the laws of that State the situs of each of the trusts arising under the wills of deceased residents of that State continues for purposes of taxation within that sovereign power. The trust on which the property is held in each case was created by judicial decree of a court of another jurisdiction. Its terms can be enforced only*

by the courts of that jurisdiction. They cannot be enforced by courts of this Commonwealth even though all the trustees might reside here. *Jenkins* v. *Lester*, 131 Mass. 355. Interpretation of the terms of the will ordinarily is not within the province of our courts. *Emery* v. *Batchelder*, 132 Mass. 452. *There is nothing in these records to indicate that the trustees were obliged to resort to the courts of this Commonwealth for aid in the performance of any duty resting upon them under the trust.* *Bliss* v. *Bliss*, 221 Mass. 201, 109 N. E. 148, L. R. A. 1916A, 889. Compare *Baldwin* v. *Missouri*, 281 U. S. 586, 593, 597, 50 S. Ct. 436, 74 L. ed. 1056; *Farmers Loan & Trust Co.* v. *Minn.*, 280 U. S. 204, 208, 50 S. Ct. 98, 74 L. ed. 371. It is to be noted that the income tax established by our laws is a tax on property and not an excise tax. *In re Opinion of the Justices*, 220 Mass. 613, 624, 108 N. E. 570; *Hart* v. *Tax Commissioner*, 240 Mass. 37, 39, 132 N. E. 621; *In re Opinion of the Justices* (Mass.) 165 N. E. 900. We think that it is within the competency of New York to require that the intangible personal property of one of its deceased residents, whose will has been allowed by its court acting as the court of the domicil of the decedent, in the custody of fiduciaries appointed by such court to hold and administer that intangible personal property according to the will of the deceased resident and being so held and administered by such fiduciaries with responsibility for accounting to that court, shall have and continue to have a situs for taxation within its jurisdiction. Intangible personal property in these circumstances manifestly is within the jurisdiction of the courts of New York for all purposes of administration. The management, investment, safety, accountability, sale, transfer, control and final distribution of such property are vested in the courts of New York. See *Sewall* v. *Wilmer*, 132 Mass. 131, 136, 137. * * * The principle that the situs of intangible property held in trust, which in the absence of other controlling factors follows the person of the trustee, becomes inapplicable because by a dominating law its situs is fixed in the place where the testamentary trust was created and established and is being administered under direction of its court.

For all purposes incident to the cases at bar, its situs is immovably established within the State where the testamentary trust of which it is a part is being administered." (Italics inserted.)

Half of the trust property is not owned by George Henry Warren as trustee, it being the rule of law both in Rhode Island and New York that trust property held by two or more trustees is jointly owned, and that the trustees must act as a unit. In taxing the intangible personal property of the trust in this case, included in the tax bill (R. 27 10 Q), the assessors actually attempted to tax the joint interest of Mr. Warren's co-trustee, William Greenough, a resident of New York.

Section 66 of the Real Property Law of New York (which applies to personal property also) (R. 24) provides as follows:

> "Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy; but every estate, vested in executors or trustees as such, shall be held by them in joint tenancy. This section shall apply as well to estates already created or vested as to estates hereinafter granted or devised."

This is strictly a New York trust created and administered exclusively under the laws of New York.

On this question, the Court in *Newcomb* v. *Paige*, 224 Mass. 516, 520 (*supra*), specifically stated:

> "When there are several trustees, one or more of whom is domiciled in the State of origin of the trust, and the corporeal custody of the securities of the trust is with that trustee at his domicil, and the title of the trustees is joint and their powers must be exercised as a unit, there is no such several ownership in one trustee resident outside the State of the establishment of the trust, but resident in Massachusetts, as brings

him within the scope of our tax law as to the trust property. St. 1909 c. 490, Part I, § 23. Under these circumstances he alone as resident of this Commonwealth does not hold the title as owner within the Commonwealth in such sense as to bring him within the terms of the tax act. He cannot exercise ownership as a resident in this Commonwealth, but only by conjoint action with his fellow trustees, none of whom are resident here, as to a fund in substance in the custody of the courts of another jurisdiction. His ownership is not of such character as to bring the taxable domicil of the trust within the terms of our law."

and in Dorrance's Will, *supra*, the Court said:

"They hold the trust property as a unit in the State of New Jersey."

The Rhode Island statute and Supreme Court recognize this principle although the Supreme Court in its opinion in this case made no reference to this Rhode Island law in discussing the question (R. 45). Chapter 431 of the General Laws of 1938, Sec. 1, provides:

"§ 1. All gifts, feoffments, grants, conveyances, devises or legacies, of real or personal estate, which shall be made to 2 or more persons, whether they be husband and wife or otherwise, shall be deemed to create a tenancy in common and not a joint tenancy, unless it be declared that the tenancy is to be joint, or that the same is to such persons and the survivors or survivor of them, *or to them as trustees or executors*, or unless the intention manifestly appears that such persons shall take as joint tenants and not as tenants in common."

Angel v. *Moni*, 45 R. I. 186, was an action to recover for use and occupation. One of the trustees agreed to accept a new tenant. The Court held that he could not bind his co-trustees. Said the Court:

"The law is well settled that where several trustees are appointed to administer a trust they form one col-

lective trustee, and that any action depending on the exercise of judgment or discretion on the part of the trustee requires the joint action of all."

This seems to be the settled law, adopted by all of the authorities.

Franklin Institution for Savings v. *People's Savings Bank*, 14 R. I. 632.

See also:

Bogert on Trustees, Vol. 1, Sec. 145;

Scott on Trusts, Sec. 194, note 1;

Restatement Trusts, Sec. 194;

Dorrance Will (*supra*).

In New York and Rhode Island, therefore, that trustees are joint tenants, required to act as a unit, is a statutory rule of property and in no sense a legal fiction.

The Rhode Island Court has no jurisdiction over George Henry Warren, Jr. in his official capacity.

This brings us to the next question,—whether because George H. Warren Jr. happens to be a resident of Rhode Island, he automatically becomes taxable as trustee of a New York trust of a New York fund for a New York beneficiary.

This important question was discussed and decided in the case of *Goodsite* v. *Lane*, 139 Fed. Rep. 593.

In that case, the testator, Griswold, died a resident of Connecticut. He named as trustees his widow and a son-in-law, both of whom resided in Ohio. All the trusts, which consisted wholly of securities, were in New York and never, at any time, in Ohio. Subsequently, the widow died and the Probate Court of Connecticut appointed as trustees one Spencer of New York and Moss of Ohio. Subsequently, by arrangement, Moss became sole trustee of one-half belonging to his mother-in-law, Mrs. Lane, a resi-

dent of Connecticut. The suit was brought by the Treasurer of Erie County, Ohio, to recover taxes for the years 1898 to 1913, inclusive.

The Ohio statute was as follows:

> "all property, whether real or personal, in this state, * * * and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in this state, shall be subject to taxation." Section 2731, Rev. St. 1890.

The Court held that the trustee in Ohio was not taxable as such, because, although a resident of that state, he was not there in his official capacity.

Said the Court at page 594:

> "Applying the rule mentioned *supra*, the state of Ohio taxes tangible property located in the State, because of its jurisdiction of the property; and it taxes intangible property located without the state, because of its jurisdiction of the person residing in the state who holds it. The property involved in this case had never been brought within the state of Ohio, and therefore could not be taxed upon the ground that it was tangible property within the state. The tax must be sustained, if at all, upon the ground that the estate was the property of a person residing in Ohio, who, being within the jurisdiction of the state, and owing it an obligation, might be compelled to contribute to its support out of his property, wherever located. *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 498, 25 L. Ed. 558.
>
> The exaction must find its justification in the privileges and protection enjoyed in the state, under its laws, by the person taxed, in the capacity in which taxed. The person taxed must therefore be in the jurisdiction of the state not only personally, but officially, in the capacity in which he is taxed, and in that capacity must be enjoying the benefits referred to. In the case of a trustee, he must be exercising his office of trustee within the state, and be enjoying, as trustee, privileges of value to the estate, for which it is just the estate should pay. An examination of the

cases will show that, where this tax has been sustained, either the trust estate or the beneficiary, or the trustee, as trustee, was receiving benefits from the state, for which it was only fair the trustees should pay. Price *v.* Hunter (C. C.) 34 Fed. 355, 356; Borough of Carlisle *v.* Marshall, 36 Pa. 397, 402; Lewis *v.* County of Chester, 60 Pa. 325, 330; Guthrie *v.* Ry. Co. Co., 158 Pa. 433, 439, 27 Atl. 1052; Mayor of Baltimore *v.* Stirling, 29 Md. 48; Appeal Tax Court *v.* Gill, 50 Md. 377, 396; Mackay *v.* San Francisco, 128 Cal. 678, 61 Pac. 382; Trustees *v.* City Council, 90 Ga. 634; 17 S. E. 61, 20 L. R. A. 151. But where the estate and beneficiaries were outside the state, and the trustee only resided, and did not act as trustee within the state, the tax was not sustained. Hawk *v.* Bonn, Auditor, 6 Ohio Cir. Ct. R. 452; People ex rel. Darrow *v.* Coleman, 119 N. Y. 137, 23 N. E. 488, 7 L. R. A. 407. In the case of Gallup *v.* Schmidt, 154 Ind. 196, 56 N. E. 433, an estate was held taxable in Indiana, where the trustee was appointed, although he was a resident of New Hampshire, the court holding that, having been appointed in Indiana, he was to be regarded, in his capacity of trustee, as a resident of that state. Page 200 of 154 Ind., page 443 of 56 N. E. In the present case neither the trust estate nor the beneficiary nor the trustee, in any proper sense, was within the jurisdiction of the State of Ohio. The trust estate was in New York. The trustee was appointed in Connecticut, and acted wholly outside of Ohio. The fact that as an individual he resided in Ohio could not authorize the taxation of this foreign estate, which had received no benefit whatever from the laws of Ohio."

Said the court in *Lewis* vs. *City of Chester, supra,* at pages 329, 330:

"But as to the other property or money never brought into and not in fact held and invested under our laws, its *situs* remains in New York. *The fact that she is personally here does not make her a trustee here,* or amenable to our jurisdiction for property not brought here and subjected by her act to the operation

of our laws. *Not being a trustee under our law or amenable for property not accompanying her person, clearly there is no power to tax her for what she holds in New York, as a trustee, under the law of New York, and amenable only to the authority of that state.* The Act of 1845 does not extend to such a case, but must be confined to the property she has here, and has subjected to our law, by investing it here. All of the cases cited in support of the view of the learned court below, were those where the trustee was appointed or exercised his authority under our law: *West Chester* v. *Darlington*, 2 Wright, 157; *Bor. Carlisle* v. *Marshall*, 12 Casey 397; *Spangler* v. *York County*, 1 Harris 322; *School Directors* v. *James*, 2 W. & S. 568. In those cases Pennsylvania stood to the trustees as New York does to Mrs. Lewis in this, and therefore lawfully imposed the tax. Mrs. Lewis is liable for the taxes on the sum of $14,800 invested by her in mortgages in this state." (Italics inserted.)

In the *Union Transit Company* case, the Court said:

"The power of taxation indispensable to the existence of every civilized government is exercised upon the assumption of an equivalent rendered to the tax payer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance and to which it looks for protection, *the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax*, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law." (Italics inserted.)

The Court further said:

"'It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state, receives none of the protection for which the tax is supposed to be the compensation. * * * The argument against the taxability of land within the jurisdiction of another state applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing state but does not and cannot receive protection under its laws."

In the *Safe Deposit and Trust Company* v. *Virginia*, 280 U. S. 83, 50 S. Ct. 59, the Supreme Court held that a statute of a state which undertakes to tax things utterly beyond its jurisdiction conflicts with the Fourteenth Amendment of the United States Constitution: that tangible personal property permanently located beyond owners' domicil may not be taxed at the latter place; that intangible personal property may acquire a taxable situs where permanently located, employed, and protected, and that a trust estate transferred and delivered by a resident of Virginia to a Trust Company in Maryland and consisting of intangible property such as stocks and bonds without any person in Virginia having the right of enjoyment or right to remove *res*, was not subject to taxation in Virginia (under a property tax) regardless of the maxim, *mobilia sequuntur personam*. The Court further held that the securities were held by the trustee in Maryland; that nobody within Virginia had the present right to their control or possession, or to receive income therefrom, or to cause them to be brought physically within her borders and that they had no legal situs for taxation in Virginia unless the legal fiction *mobilia sequuntur personam is applicable and controlling*. The Supreme Court of Virginia, recognizing this, held the two beneficiaries domiciled

in Virginia really owned the fund and that by reason of the fiction its taxable situs followed them.

The Court went on to say that ordinarily it recognized that the fiction may be applied in order to determine the situs of intangible personal property for taxation (*Blodgett* v. *Silberman*, 277 U. S. 1, 48 S. Ct. 410), but that the general rule must yield to established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice whether through double taxation or otherwise.

> "Where the possessor of the legal title holds the securities in Maryland, thus giving them a permanent situs for lawful taxation there, and no person in Virginia has present right to their enjoyment or power to remove them, the fiction must be disregarded. It plainly conflicts with fact; the securities did not and could not follow any person domiciled in Virginia. Their actual situs is in Maryland and cannot be changed by the *cestuis que* trust."

Nothing decided by the Supreme Court of the United States since *Safe Deposit and Trust Co.* v. *Virginia* has altered the rule announced in the cases cited and from which we have quoted as to jurisdiction to tax by reason of power over the thing taxed and the extension of benefits or protection over the thing taxed or its owner. Nothing decided by the Supreme Court in *Curry* v. *McCanless*, 307 U. S. 357, 59 S. Ct. 900 and *Graves* v. *Elliott*, 307 U. S. 383, 59 S. Ct. 913, questions the fundamental propositions hereinbefore asserted. In support of this statement, we refer to the following:

In the case of *Utah* v. *Aldrich* (1942), 316 U. S. 174, 62 S. Ct. 1008, Mr. Justice DOUGLAS, delivering the opinion of the Court, said at page 181:

> "In line with our recent decisions in *Curry* v. *McCanless*, *Graves* v. *Elliott* and *Graves* v. *Schmidlapp* we repeat that there is no constitutional rule of

immunity from taxation of intangibles by more than one State. In case of shares of stock 'jurisdiction to tax' is not restricted to the domiciliary State. *Another State which has extended benefits or protection or which can demonstrate 'the practical fact of its power' or sovereignty as respects the shares* (Blackstone *v.* Miller, 188 U. S. page 205, 23 S. Ct. page 278, 47 L. Ed. 439) *may likewise constitutionally make its exaction.*"

Mr. Justice FRANKFURTER in his concurring opinion said at page 183:

> "Of course, the Due Process Clause has its application to the taxing powers of the States. • • • A State cannot tax a stranger for something that it has not given him. When a State gives nothing in return for exacting a tax it may be said that there is no 'jurisdiction to tax.'"

See also 54 Harvard Law Review, 949-954, "State Taxation in a National Economy," where the learned author says of recent United States Supreme Court decisions:

> "The current doctrine of the majority is that the due process clause does not bar 'double taxation.' *It sets up as the test of validity that the taxing state must furnish protection to or exercise control over the persons whose relationships give rise to intangible property rights.*"
>
> • • • "The view of the present majority that double taxation is not proscribed by the Fourteenth Amendment but that taxes which may be termed extra territorial are forbidden, completes a cycle of constitutional history."

It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the Court should adopt the construction which would uphold it. (*Nar-*

ragansett Electric Lighting Co. v. *Sabre*, 50 R. I. 288, 146A. 777, 147A, 668),

> "The duty of the courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction that will not subject it to a succession of doubts as to its constitutionality." (11 Amer. Jurisprudence, Sec. 97, Title—Constitutional Law.)

> "The rule is also generally accepted that when a statute is broad enough to cover matters without the state as well as within, and as applied to matters without the state it would be unconstitutional, the Court may restrict the application to matters within the jurisdiction of the state." (11 American Jurisprudence Supra, Section 100, page 734.)

B.

The opinion of the Rhode Island Supreme Court admits that the State has not as yet actually extended any specific benefit to or protection over the resident trustee or the trust fund.

What benefits or protection to this trust fund have the State of Rhode Island or the City of Newport extended? How can the assessors demonstrate that the co-trustees who are joint tenants of the fund are not "strangers" to whom Rhode Island has given nothing? As stated by Mr. Justice FRANKFURTER in *Utah v. Aldrich* (*supra*):

> "When a State gives nothing in return for exacting a tax it may be said that there is no jurisdiction to tax."

BAKER, *J.*, writing the opinion of the Supreme Court of Rhode Island, filed May 31, 1946, from which this appeal is taken, says (R. bottom of page 47):

> "While it is true that nothing appears on the record to show that this state has as yet actually extended any specific benefit to or protection over the resident trus-

tee or the trust fund, other than by the decree of the probate court of Newport hereinbefore mentioned, nothing indicates that the state is not ready, willing and capable of doing so if requested. We know of nothing in our statutes or decisions which is of a discriminatory nature respecting a resident trustee of a trust originating in another state. Such trustee, in our opinion, would be entitled to the same benefits and protection from the laws of this state as would any other natural person here resident."

We maintain that it does not follow that because there is no discrimination against a non-resident trustee under the laws of Rhode Island that Rhode Island accords him any benefit or protection as trustee.

The decree of the Probate Court of Newport referred to by BAKER, *J.*, in the above quotation from his opinion was, as appears from the petition of the appellants for relief from the tax assessment (R. p. 1), a decree which ordered a copy of the will authenticated under the act of congress and filed and recorded. Letters Testamentary in Rhode Island were issued to executors named therein, who are the present appellants. The will was filed and recorded pursuant to Sections 10, 11, 12 and 13 of Chapter 572 of the General Laws of Rhode Island 1938, which provide as follows:

"Filing and Recording Foreign Wills.

"§ 10. Whenever the executor or any other person interested in any will, which has been finally proved and allowed in a probate court in any other of the United States, in any territory or district thereof, or in a probate court in any foreign country, shall produce a copy of such will and of the probate thereof, duly authenticated according to the act of congress, to any probate court in any town or city in this state where the testator had estate, real or personal, whereon the will may operate, and shall in writing request that the will may be filed and recorded in the office of the probate clerk in such town or city, the court shall assign a time and place for a hearing thereon.

"§ 11. Upon such request, the court shall cause notice thereof to be given in the same maner as if said will was presented to such court for probate, to the end that any person may appear and show cause why said copy should not be filed and recorded.

"§ 12. If, at the hearing, no sufficient cause is shown to the contrary, the court may order said copy to be placed on file and recorded: *Provided, however,* that, as to real estate in towns other than that in which said copy is filed and recorded, the title shall not pass, for the purposes of conveyance by the devisee, until a certified copy thereof is recorded in the records of land evidence in such other town or city in which any such real estate is situated; *and provided further,* that when any such copy is duly filed and recorded as aforesaid, title to lands devised by the will shall relate back to the death of the testator.

"§ 13. Whenever a copy of any will which has been finally proved and allowed in any probate court in any other of the United States, in any territory or district thereof or in any foreign country, shall be finally ordered to be filed and recorded in a probate court in this state pursuant to the 3 preceding sections, the filing and recording thereof shall be of the same force and effect as if the will had been originally proved and allowed in this state, subject to the provisos in § 12; and the probate court in which the copy of said foreign will is ordered to be filed and recorded may grant letters testamentary to the executor therein named, or letters of administration with the will annexed to such person as the court may deem fit, taking bond from such executor or person as in case of a will proved and allowed in such probate court."

The testator, as appears from portions of the will not included in the record on this appeal, owned real estate in Newport, Rhode Island, known as "Seafield", which under Article Eighth of the will he devised to his son, George Henry Warren, Jr., on a condition which the son did not accept, and under the terms of the will, the property thereupon fell into and became a part of the testator's residuary

estate. The executors filed and recorded the will under Chapter 572 above quoted, in order to comply with the provisions of Section 41 of Chapter 556 of the General Laws of Rhode Island 1938, which provides as follows:

> "§ 41. Title to real or personal estate shall pass by will when such will has been finally proved: *Provided, however;* that title to real estate situated in any town or city of this state other than that in which the will is proved, shall not pass by will for the purpose of conveyance by the devisee until, in addition to such probate, a copy of such will as proved, duly certified by the probate clerk, be recorded in the records of land-evidence in such other town or city. Any foreign will shall be recorded as provided in §§ 10 to 15, inclusive, of chapter 572, and § 1 of chapter 573, and when finally allowed shall operate to pass the title to all lands in that town or city where such will is duly recorded as aforesaid, and in any other town or city in which a duly certified copy thereof has been recorded in the records of land-evidence in such town or city and not otherwise: *Provided, however*, that when any such will is duly proved, or proved and recorded, as aforesaid, title to lands as devised thereby shall relate back to the date of the death of the testator.

The statute relative to the filing and recording of foreign wills effectuates Article 4, Section 1, of the Constitution of the United States, providing that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and that Congress may by general laws prescribe the manner by which such acts, records and proceedings shall be proved, and the effect thereof. It has never been contended that executors of a will of a non-resident decedent which has been proved in state "A" by the act of filing the foreign will and obtaining its recording in state "B", subject themselves to tax jurisdiction in state "B". So here the giving of full faith and credit by the state of Rhode Island and the Probate Court of Newport, Rhode Island, to the public acts and judicial proceedings of the Surrogate's Court in and for the County

of New York, in the State of New York, admitting the will of George Henry Warren to probate and issuing Letters Testamentary to George Henry Warren, Jr. and William Greenough, as executors, constituted no requirement of submission to taxation by the appellants herein of property, tangible or intangible, not within the jurisdiction of Rhode Island.

The act of congress referred to in Section 10 of Chapter 572 of the General Laws of Rhode Island, providing how the judicial proceedings of the court of a foreign state shall be authenticated, is Section 905, R. S. U. S. (Sec. 687 U. S. Code Annotated).

The admission of the New York will to probate in Rhode Island did not give the court in Rhode Island jurisdiction over the executors named in the will in their capacities as trustees, but the management of the estate in that respect remained with the New York court by which the first appointment was made. (*Joy* v. *Elton*, 83 N. W. 875; *Hutchins* v. *Long*, 272 Mass. 422, 427, 428.) The final quoted sentence from Judge BAKER'S opinion to the effect that a resident trustee of a trust originating in another state would be entitled to the same benefits and protection from the laws of Rhode Island as would any other natural person there resident, amounts to no more than the statement that such a trustee has the privilege of suing in the Rhode Island courts in respect of causes of action available to other natural persons resident in Rhode Island. As stated by counsel in the argument against the *"State Tax on Foreign-Held Bonds"*, reported in 15 Wallace, at page 311:

> "It is idle to say that the state of Pennsylvania accorded to him the right to sue in her courts; a similar right is accorded to foreigners by every civilized community on the face of the earth; but no one ever supposed that non-resident foreigners were thereby rendered taxable under the laws of every community which recognized such a right."

So it is idle to say that the State of Rhode Island, by passing a statute permitting the filing and recording of for-

eign Wills admitted to probate in another state, thereby rendered non-resident foreigners taxable on their intangible property in Rhode Island.

Clearly, George Henry Warren, Jr. as an individual residing in Rhode Island is not the same legal person as George Henry Warren, Jr. as trustee under the will of his father, by appointment of the Surrogate's Court in the County of New York, under the laws of the State of New York, and a judgment against him either in New York or in Rhode Island, as trustee, would not be *res adjudicata* against him as an individual in a subsequent action involving the same identical issue. (*Rathbone* v. *Hooney*, 58 N. Y. 463; *Landon* v. *Townshend*, 112 N. Y. 93; *Collins* v. *Hydorn*, 135 N. Y. 320; *First National Bank* v. *Shuler*, 153 N. Y. 163, 173.)

Obviously no such demonstrations by the State of Rhode Island of sovereignty over the trust fund or the resident and non-resident trustees are possible. The trust fund is not in Rhode Island and taxes which may be termed extraterritorial are forbidden by the XIV Amendment (*supra*). George Henry Warren, Jr. is not in Rhode Island as *trustee* and the Courts of Rhode Island cannot exercise control over him as *trustee* on the basis of the legal maxim *mobilia sequuntur personam*. This maxim ought not to be applied if so to do would result in inescapable and patent injustice. (*Safe Deposit and Trust Co.* v. *Virginia*, *supra*. See also dissenting opinion of BUTLER, *J.*, in *Curry* v. *McCandless*, 307 U. S., p. 381.) To allow one-half the corpus of the trust in this case to be taxed by Rhode Island would result "in giving the fiction an oppressive operation" (*Graves* v. *Elliott*, 307 U. S. 391, dissenting opinion of HUGHES, *C. J.*.) The State of Rhode Island cannot collect the tax assessed either by an action in rem against the securities owned by the trust or against the trustees in New York. (*State of Colorado* v. *Harbeck*, 232 N. Y. 71.) Furthermore, the courts of New York would decline to transmit the securities to Rhode Island to enable Rhode Island to enforce its tax laws. (*Matter of Martin*, 255 N. Y. 359; *Wisconsin* v. *Pelican Insurance Company*,

127 U. S. 265.) Rhode Island has no enforcible lien on the securities.

The State of Rhode Island has no power to prevent George Henry Warren, Jr. (a) from resigning as trustee at any time, or (b) from changing his residence to New York, or elsewhere, or (c) from in some way becoming physically or mentally disqualified to act as trustee. In case George Henry Warren, Jr., should die, resign or become disqualified to act as trustee, the United States Trust Company of New York would become trustee in George Henry Warren, Jr.'s place. (Will, Art. Sixteenth, R. 55) Thereupon, all pretense of jurisdiction of the State of Rhode Island to tax the trust fund would necessarily cease as both the trustees and the beneficiary of the trust would be residents of New York. Furthermore, the State of Rhode Island cannot control the contingency of the death of George Henry Warren, Jr. which would have the same effect as his resignation or disqualification to act as trustee.

We submit that the assessment of one-half of the trust fund in this case to the co-trustee of the New York trust fund simply because as an individual he resides in Rhode Island is an "illegal exaction disguised under the name of taxation" under the XIVth Amendment.

The appeal of the appellants should be granted.

Respectfully submitted,

WILLIAM R. HARVEY,
WILLIAM GREENOUGH,
Attorneys for Appellant.

J. RUSSELL HAIRE,
WILLIAM R. HARVEY,
WILLIAM GREENOUGH,

SHEFFIELD & HARVEY,
Newport, R. I.,
Of Counsel.

Dated, December , 1946.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 461

WILLIAM GREENOUGH and GEORGE HENRY WARREN, JR., Trustees,

Appellants,

vs.

TAX ASSESSORS OF THE CITY OF NEWPORT; and EDWARD L. LEAHY, Tax Administrator of the State of Rhode Island.

APPELLANTS' REPLY BRIEF

WILLIAM GREENOUGH,
WILLIAM R. HARVEY,
Attorneys for Petitioners.

J. RUSSELL HAIRE,
WILLIAM R. HARVEY,
WILLIAM GREENOUGH,

SHEFFIELD & HARVEY,
Newport, R. I.
Of Counsel.

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APPELLANTS' REPLY TO BRIEF FOR APPELLEES

No case is cited by the appellees in which an *ad valorem* tax has been sustained against one of two or more trustees except where that one of the trustees lives in the domiciliary state of the testator or where the *res* is in the same state in which such one of the trustees is a resident.

On page 14 of their brief the appellees cite the case of *People ex rel. Beaman* v. *Feitner*, 168 N. Y. 360, 61 N. E. 280, quoting from an erroneous statement in the note on page of 67 A. L. R. that the case arose "under the will of a New Jersey testator."

An examination of the records of that estate in the Surrogates Court of New York, a exemplified copy of which is in the possession of the appellants, shows that the testator executed a will and three codicils, in each of which between 1888 and 1896 he described himself as of the City of New York and the letters issued on November 25, 1897, by the Surrogates Court recite "and the said deceased

having been at the time of his death a resident of the County of New York."

On page 14 of their brief, appellees also cite *Welch* v. *City of Boston*, 221 Mass. 155, 109 N. E. 174 (1915), which sustained a tax against the two sole trustees of a Maine estate where the securities were for the benefit of a California beneficiary.

In that case all of the trustees were residents of Boston and there was no question of the severability of the ownership jointly or as a unit by the trustees.

In fact, the decision of *Newcomb* v. *Paige*, 224 Mass. 516, 113 N. E. 458, cited on page 10, 12 and 19 of appellants brief, where the question of joint ownership by trustees arose was decided by the same court, the opinion was written by the same Chief Justice in the year after the decision in the Welch case.

In the case of *Crocker* v. *City of Malden*, 229 Mass. 516, 118 N. E. 527 (1916), the creator of the trust was a resident of Massachusetts and the *res* was located there. It was the domiciliary state which also controlled the property. In construing the Massachusetts statute the court uses the following significant language:

> "The part thereof which provides that the personal estate shall be assessed 'in equal portions' where the trustees reside in different places (*within the commonwealth*), is a recognition of a rule existing before the statute and of the general principle, which underlies our system of taxation, that all personal property shall be assessed to the owner in the city or town in which he is an inhabitant. Hardy *v.* Yarmouth, 6 Allen, 277."

The United States Court recognizes the principle that co-trustees act only as a unit.

Wilbur v. *Almy*, 12 Howard 180;
Howard Fire Ins. Co. v. *Chase*, 5 Wall. 509;
Winslow v. *Baltimore & Ohio Railroad Co.*, 188 U. S. 646.

Appellees also cite the case of *Adman* v. *Honey* on pages 19 and 20. In that case sole trustee was Honey, a Rhode Island resident appointed by a South Carolina Court of a South Carolina trust. He invested in mortgages in Newport, Rhode Island. There again the Court had jurisdiction over a sole trustee who invested in Rhode Island property (indirectly in real estate) so that the Court had jurisdiction over both the trustee and the trust *res*. All the cases cited by the Court in that case are cases where the *res* is a mortgage within the state where the trustee resided. This distinction is recognized by all of the courts (see *Lewis* v. *City of Chester*, cited on pp. 13 and 14 of appellants brief), and this is the same situation as arose in *Price* v. *Hunter*, 34 Fed. Rep. 355 cited on page 13 of appellees brief.

Respectfully submitted,

WILLIAM GREENOUGH,
WILLIAM R. HARVEY,
Attorneys for Petitioners.

J. RUSSELL HAIRE,
WILLIAM R. HARVEY,
WILLIAM GREENOUGH,
SHEFFIELD & HARVEY,
Newport, R. I.,
Of Counsel.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 461

WILLIAM GREENOUGH AND GEORGE HENRY WARREN, JR., TRUSTEES,

Appellants,

vs.

TAX ASSESSORS OF THE CITY OF NEWPORT AND EDWARD L. LEAHY, TAX ADMINISTRATOR OF THE STATE OF RHODE ISLAND

APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF NEWPORT, STATE OF RHODE ISLAND

STATEMENT OPPOSING JURISDICTION

JOHN C. BURKE,
City Solicitor.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 461

WILLIAM GREENOUGH AND GEORGE HENRY WARREN, JR., TRUSTEES,

Appellants,

vs.

TAX ASSESSORS OF THE CITY OF NEWPORT AND EDWARD L. LEAHY, TAX ADMINISTRATOR OF THE STATE OF RHODE ISLAND

STATEMENT BY APPELLEES OF GROUNDS IN OPPOSITION TO APPELLATE JURISDICTION OF ABOVE COURT PURSUANT TO SUPREME COURT RULE 12.

The appellees state the following matters and grounds against the jurisdiction of this Court as asserted by the appellants herein on the seventh day of August, 1946, as required by Rule 12 of the Supreme Court.

I

The statute relied on by appellants herein to sustain the appellate jurisdiction of this Court i. e. Section 344 of Title 28 of the United States Code, is not applicable to this case for the reasons that the decision of the Supreme Court of the State of Rhode Island on the Federal question was not necessary to the determination of this action because non-Federal questions were presented to said court which were

not decided and if passed on could have terminated the case.

In support of these contentions the appellees cite the following cases:

Zucht v. *King*, 260 U. S. 174;
Sennette v. *St. Mary's Parish Police Jury*, 129 La. 728, 56 S. 653;
Bell Tel. Co. v. *Okl.*, 303 U. S. 206, 82 L. Ed. 751;
Alabama State F. of L., etc. v. *McAdory* (Alabama 1945), 65 S. Ct. 1384, 89 L. Ed. —;
Adams v. *Russell*, 229 U. S. 353, 57 L. Ed. 1224;

and numerous other cases to the same effect.

II

Appellants allege in their petition to certify this case to this Honorable Court that all of the property of the trust was located in the City of New York and that there was no property of the trust estate in the State of Rhode Island, and that the tax which is the subject of this controversy was paid by them under protest. Appellees contend, therefore, that as there was no demand or levy, or attempt to levy, and no compulsion, coercion or duress, the payment of the tax must be considered, under the circumstances of this case, as having been a voluntary payment, and does not constitute a taking of property without due process of law within the meaning of the Constitution of the United States, or a violation of the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

III

Appellants were not required to pay the tax; they had ample remedy at law or in equity to protect them from

paying a tax which they contend was illegal, unconstitutional or void, and as the payment was not exacted it was not a taking of property without due process of law within the meaning of the Constitution of the United States, and the decision of the question of whether or not the statute of the State of Rhode Island (Chapter 30, Section 9, Subsection Fifth, G. L. 1938) was unconstitutional or in conflict with Article 14 of the Amendments to the Constitution of the United States was not necessary to the determination of the case.

IV

It appears affirmatively that appellees raised two questions before the Supreme Court of the State of Rhode Island: (1) That the petition could not be properly brought in its present form under the provisions of Section 14, Ch. 31, G. L. 1938 (Page 111, G. L. Rhode Island 1938). (2) That the payment of the tax under the circumstances of this case was a voluntary payment which could not be recovered back. The Supreme Court of the State of Rhode Island declined to pass on these questions, stating that because of the ultimate disposition of the case it was not necessary to pass upon said questions and thereupon passed upon and decided the case on the Federal question of the constitutionality of the statute. The court could have decided either one of the above non-Federal questions in favor of the appellees which would have been decisive of the case and the constitutional question would not then have arisen.

V

That the amount of the tax is such a trifling sum it does not represent a substantial controversy and there is no substantial Federal question presented.

VI

That the statement of the appellants does not cite the cases believed to sustain jurisdiction as provided in Rule 12, Paragraph 1.

VII

Appellees move that said appeal be dismissed.

Dated August 19, 1946.

Respectfully submitted,

(S) JOHN C. BURKE,
City Solicitor,
City of Newport, R. I.,
Counsel for Appellees.

FILE COPY

JAN 27 1947
CHARLES ELMORE CROPLEY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 461

WILLIAM GREENOUGH AND
GEORGE HENRY WARREN, JR., Trustees,
Appellants,

v.

TAX ASSESSORS of The City of Newport; and
EDWARD L. LEAHY, Tax Administrator of the State of Rhode Island,
Appellees

BRIEF FOR APPELLEES

JOHN C. BURKE
Special Counsel

ALEXANDER G. TEITZ
City Solicitor

Attorneys for Tax Assessors of the City of Newport.

JOHN H. NOLAN
Attorney General of the State of Rhode Island

Attorney for Edward L. Leahy, Tax Administrator of the State of Rhode Island

Appellees

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 461

WILLIAM GREENOUGH AND
GEORGE HENRY WARREN, JR., Trustees,
Appellants

v.

TAX ASSESSORS of the City of Newport; and
EDWARD L. LEAHY, Tax Administrator of the
State of Rhode Island,
Appellees

BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the Superior Court of the State of Rhode Island, from which the appeal to the Supreme Court of the State of Rhode Island was taken, appears in the Record at pages 34 to 37. This opinion has not been reported. The opinion of the Supreme Court of Rhode Island (R. 39) is reported in 71 R. I. 477, 47 Atlantic Reporter, 2d, 625.

JURISDICTION

This case is upon appeal from the Superior Court of Rhode Island under Section 344 of Title 28 of the United States Code, which is Section 237 of the Judicial Code, on the ground that there was drawn into question the validity of a statute of the State.

The case below is reported in 47 A. 2nd, 625.

QUESTIONS PRESENTED

Whether, under the provisions of sub-division Fifth of Section 9 of Chapter 30 of the General Laws of Rhode Island of 1938, George Henry Warren, Jr., a domiciled resident and inhabitant of the City and County of Newport, State of Rhode Island, one of two trustees, can be taxed as trustee on one-half of the intangible trust property, a trust created under the will of George Henry Warren who was a resident of New York, his co-trustee being a resident of New York and the cestui que trust being a resident of New York.

STATUTE INVOLVED

The statute involved (General Laws of Rhode Island, 1938, Chapter 30, Section 9, Subdivision Fifth) imposes an ad valorem tax as follows:

> "FIFTH. Intangible personal property held in trust by any executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee resides; and if there be more

than one such executor, administrator or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

The tax assessed is as follows:

"Warren, George H. Jr. Trustee u/w of George H. Warren for Constance Whitney Warren. Intangible Personal Property, $12,500. Tax $50." (R. 3, 14).

The uncontradicted evidence shows that, according to information given the Tax Assessors of Newport, prior to the above assessment, by William P. Sheffield, Attorney as the representative of the trustee, George Henry Warren, Jr., $12,500 was one-half of the sum held by the trustees on the date of the assessment as the then corpus of the aforesaid trust created under the fifth and sixth clauses of the testator's will (R. 27), Opinion of the Supreme Court (R. 40).

The trustees paid the tax under protest alleging that the assessment was in violation of Article IV, Section 2, of the Constitution of the United States (R. 32-33).

STATEMENT

The facts are undisputed. (R. 1-5)

SUMMARY OF ARGUMENT

Appellees' contentions may be briefly summarized as follows:

The application of the tax statute to the facts in this case is not unconstitutional and is not in contravention of the provisions of the Fourteenth Amendment.

ARGUMENT

I. CONSTITUTIONALITY

The application of the tax statute to the facts in this case is not unconstitutional and is not in contravention of the provisions of the Fourteenth Amendment.

> "The power to tax is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation . . ."
>
> *State Tax Commission of Utah v. Aldrich*
> 316 U. S. 174; 86 L. Ed. 1358

> "Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalization exceeding the concrete circumstances which they profess to summarize."
>
> *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 85 L. Ed. 267; 130 ALR 1229 (P. 1233)

> "The Fourteenth Amendment does not, in terms or in effect, prohibit unwise taxes, merely because

they are unwise or unfair or burdensome taxes, merely because they are unfair or burdensome.

International Harvester Co. v. Wisconsin Dept. of Taxation, 322 U. S. 435 (444), 88 L. Ed. 1373 (1381)

In *Magnano Co. v. Hamilton*, 292 U. S. 40, 78 L.Ed. 1109, 54 S. Ct. 599, it is asserted that "The due process clause of the Fourteenth Amendment is not a limitation upon the taxing power of the states except in rare and special instances".

In 51 Am. Jur. Sec. 92, under the heading of *TAXATION*, various cases on this subject are digested as follows:

"While it is clear that the exaction by a state of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution, a particular tax law or administrative interpretation or application thereof will not be struck down as a violation of the Fourteenth Amendment unless the state's action is palpably arbitrary or grossly unequal in its application to the persons concerned results in such flagrant and palpable inequity between the burden imposed and the benefit received as to amount to the arbitrary taking of property without just compensation; or is so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but is in substance and effect a direct exertion of different and forbidden power, such as the confiscation of property. Where a state's power of taxation is properly exercised, it seems clear that any taking of property thereunder does not con-

stitute a taking without due process of law. It has been said that the test of whether a tax law violates the due process clause is whether it bears some fiscal relation to the protection, opportunities, and benefits given by the state, or in other words, whether the state has given anything for which it can ask a return. Due process of law does not assure to a taxpayer the interpretation of state legislation by the executive officers of a state as against its interpretation by the courts of the state, or relief from the consequences of a misinterpretation by either. A state tax is not violative of the Fourteenth Amendment merely because of the oppressiveness of the exaction, where the method of imposing the tax is not unconstitutional. (Numerous cases cited to support each statement.)

In *Wisconsin v. J. C. Penney Co.*, Supra, the Court states:

"That (the) test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction".

"This analysis is merely a reformulation of the classic approach of this court to the taxing power of the states. (*Lawrence v. State Tax Commission*, supra (286 U. S. 280, 76 L. Ed. 1105, 52 S. Ct. 556, 87 ALR 374). Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, or even an occasional deviation over a long course of years, not unnatural in view of the confusing complexities of tax problems, do not alter the limited nature of the function of this court when state taxes come before it. At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalization exceeding the concrete circumstances which they profess to summarize".

In the annotation to the Penney case, at p. 1237 of 130 ALR, it is stated:

The court in sustaining the tax applied the simple test of whether protection, opportunity, or benefit was given by the state and received by the taxpayer in return for the tax, as the guiding criterion to sustain or defeat a tax under the due process clause, without strict adherence to the designation or description of the tax or other formulae as to taxable

event, taxable situs, jurisdiction to tax or business situs ,etc., not in terms found in the Constitution, but merely constituting judicial generalizations to express mere results in applying the true constitutional test of a state's right to tax; and concluded that the substantial privilege of carrying on business in Wisconsin which had been given to the foreign corporation clearly supported the tax, and that the state had not given any the less merely because it had conditioned the payment of the tax upon happenings (declaration of dividends) outside its own borders".

In the Dorrance case, 3 Atl. 2nd 682, 333 Pa. 162: 127 ALR 366, shown on pages 14, 20 and 21 of Appellants' brief, the court also said:

(127 ALR, page 370) "The learned court below recognized that the Trustees held by joint tenancy but, apparently treating them as tenants in common concluded that 'the undivided three-quarters interest in the trust assets held by individual residents of the State of Pennsylvania is taxable under the . . . . statute'. The legislature has not attempted to authorize a division of the joint tenancy title. It is quite apparent from the amendment * (5) to the Act (if we may refer to it) made by the same legislature at the special session of 1936, that it had no intention, when it passed the Act in 1935, to tax to resident trustees of foreign held trust property, because the Amendment provides for the taxing to resident beneficiaries of equitable interests in foreign trusts. Without now considering the power of the legislature as exercised, the amendment taxing beneficial interests would seem to indicate that the legislature thought

it had not already taxed the same property in the trustee's hands".

* (5) "The amendment passed at the first extra session of 1936, P.L. 51, 72 P.S. Sec. 3244, amends Sec. 3 by adding in the first paragraph as taxable property . . . . the equitable interest in any such personal property of the classes hereinafter enumerated, owned, held or possessed by any resident, where the legal title to such personal property is vested in a trustee, agent, or attorney in fact domiciled in another state, and where such resident is entitled to receive all or any part of the income therefrom . . . . "

"To the last paragraph of Section 3, the following was added: "The value of the equitable interest in any personal property, made subject to tax by this section, shall be measured by ascertaining the value of the personal property in which such resident has the sole equitable interest, or in case of divided equitable interests in the same personal property, then by ascertaining such part of the value of the whole of such personal property as represents the equitable interest of such resident therein".

The Dorrance case cannot be considered as an authority because

(a) The Pennsylvania statute did not provide, as does the Rhode Island Statute, for apportionment of the tax between the trustees.

and

(b) The reasoning of the Pennsylvania Court's decision is clearly that an amendment to the

Pennsylvania statute (shown above) providing for taxing of the cestuis indicated the legislative intent not to tax the trustee. It is fair to state that if it were not for the amendment to the statute, the court would not have arrived at the decision rendered.

Furthermore, it must not be overlooked in the Dorrance case that a dissenting opinion was rendered by Mr. Justice Maxey, and a careful reading of this opinion, it is believed, will convince the Court that the reasoning in the dissenting opinion is more sound and reasonable, and in the Dorrance case, the syllabus (4) plainly states (127 ALR 366):

"4. That a state statute providing for the taxation of any resident of the state on personal property held as trustee was not intended to apply in the case of resident trustees of foreign trusts is indicated by an amendment made by the same legislature at a subsequent session, providing for the taxation to resident beneficiaries of equitable interests in foreign trusts".

In 67 ALR, at Page 402, in a note to the annotation in the case of *Safe Deposit and T. Co., v. Virginia*, 280 U. S. 83, it is stated:

"So, an assessment jointly against two trustees, one a resident, and one a non-resident of the State, is void as to the non-resident, and the resident is assessable only to the extent of one half of the value of the assets of the trust. *People ex rel. Kellog v. Wells* (1905) 182 N. Y. 314, 74 N. E. 878 (reversing the same case in the Appellate Division

(1905) 101 App. Div. 600, 92 N. Y. Supp. 5). From the report of the case below it would appear that the trust was created by a will of a resident of N. Y., but that the trust securities were in New Jersey, at the time of the assessment, and not in New York".

In 51 Am. Jur., Sec. 484, it is stated that:

"In the case of several trustees who are residents of different states, the tax in each state is ordinarily apportioned to the number of trustees therein resident. Anno. 67 ALR 400; 127 ALR 379".

The trustee is the owner, for the purposes of taxation, of the property held in trust by him. *Green v. Mumford*, 4 R. I. 313 (319); *Anthony v. Caswell*, 15 R. I., 159 (161).

Whether or not the person taxed receives any direct benefit from the tax is not the test by which the constitutionality of a taxing act can be determined; instances are numerous in which the individual taxpayer receives and can receive no direct benefit. . . . from the tax. *Wood v. Quimby*, 20 R. I., 482 (490)

In *Blodgett v. Silberman*, 277 U. S. 1; 72 L. Ed. 749 (757) it was stated:

"At common law the maxim mobilia sequuntur personam applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, insofar as it relates to intangible property, including choses in action

without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the state of the domicile or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not.

Further, this principle is not to be shaken by the inquiry into the question whether the transfer of such intangibles, like specialties, bonds, or promissory notes, is subject to taxation in another jurisdiction. As to that we need not inquire. It is not the issue in this case. For present purposes it suffices that intangible personality has such a situs at the domicil of its owner that its transfer on his death may be taxed there".

In *Price v. Hunter*, 34 Fed. 355 (Pa. 1888) the Court said:

"Property held by a trustee in the state, for the benefit of another is subject to tax, irrespective of the domicile of the beneficiary.

The title to, and the possession of, the corpus of a fund being in the trustee, in the absence of statutory provisions to the contrary, its situs, for the purpose of taxation, is at the domicil of the trustee, and the fact that the beneficiaries of the trust are non-residents does not prevent the application of the general rule. (Citing numerous cases in annotation 67 ALR 393-403; also 127 ALR 379).

In *Curry v. McCanless*, 307 U. S. 357; 83 L. Ed. 1339, the Court said:

> "'Intangibles, consisting of rights not related to physical things, are merely relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in the courts.
>
> An adequate constitutional basis for imposing on a citizen of a state a tax on the use and enjoyment of rights in intangibles measured by their value is found in the state's control over the citizen at the place of his domicil, and his duty there, common to all citizens, to contribute to the support of the government of the state.
>
> The state in which an owner of intangibles has his domicil cannot be deprived, by reason of the owner's activities elsewhere, of its constitutional jurisdiction to tax such intangibles.
>
> The Fourteenth Amendment does not require the fixing of a single exclusive place for the taxation of intangibles.
>
> The due process clauses of both the Fifth and Fourteenth Amendments are directed at the protection of the individual, and he is entitled to their immunity as much against the state as against the national government.
>
> Legal ownership of intangibles in a state by a trustee located in that state affords adequate constitutional basis for imposing on the trustee a tax measured by the value of such intangibles, and the Fourteenth Amendment does not relieve the trustee from the obligation to pay such a tax."

It was held in *People ex rel Beman v. Feitner* (1901) 168 N. Y. 360, 61 N. E. 280:

> "that where two of the three trustees under the will of a New Jersey testator were domiciled in New York, the third being a non-resident, each of the resident trustees was assessable in the taxing district in which he resided, upon one third of the trust fund, consisting of securities on deposit with a safe-deposit company in New Jersey, the beneficiaries being nonresidents of New York. This decision reversed the judgment of the appellate division in (1901) 63 App. Div. 174, 71 N. Y. Supp. 261".

It was held in *Welch v. Boston* (1915) 221 Mass., 155, 109 N. E. 174:

> "the exclusive legal title to trust property is vested in the trustee. Certificates of stock, apart from express statute, have never been regarded as capable of acquiring a situs independent of the domicile of the owner and of the corporation whose fractional ownership they represent. The maxim that they follow the person of their owner as to situs has its foundation not only in convenience but in the practical necessities of business.
>
> Generally speaking intangible property . . . may be regarded for the purposes of taxation as situated at the domicile of the owner and within the jurisdiction of the state where he has such domicile. A tax upon such property to the owner at his domicile, in accordance with the state statute 'violates no provision of the Federal Constitution' ". *Buck v. Beach*, 206 U. S. 392, 401, 27 Sup. Ct. 712, 51 L. Ed. 1106, 11 Ann Cas 732. *

"Even in the light of the most recent decisions domicile of the owner usually fixes the situs of personal property, for purposes of taxation, even as to classes described as tangible, unless it has become permanently located in some other jurisdiction and, so far as adjudiciations go, is also employed in the prosecution of business there. *Southern Pacific Co. v Kentucky*, 222 U .S. 63, 74; 32 Sup Ct. 13, 56 L. Ed. 96. See 15 Columbia Law Review, 377.

"Upon this aspect of the case the contention is that the owners of stocks and bonds may establish an independent situs for the purpose of their taxation, different from the domicile of the owner, the debtor or the corporation issuing the stock, by a simple deposit of them in a foreign state, and thereby divest the jurisdiction of their domicile of the right to tax. Without undertaking to say what effect such deposit may have on the taxing power of the state of deposit, see *Wheeler v. New York*, 233 U. S. 434, 439, 446, 34 Sup. Ct. 607, 58 L. Ed. 1030, it seems to us that the power of the state of their domicile to tax them is not affected.

"If it be said that governmental protection is the consideration for taxation (*Diamond Match Co. v. Ontonagon*, 188 U.S. 82, 90; 23 Sup.Ct. 266, 47 L.Ed. 394; *Union Transit Co. v.Kentucky*, 199 U. S. 194, 202, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493), there is still support for the tax. The plaintiffs would be given whatever protection they as owners might require from our government, and they doubtless could be held by our courts to the performance of their trusts at the suit of their cestuj qui trustent or other interested parties.

"'The natural method of dealing with the taxation of invisible and intangible property is to treat with the owner where he lives, where he can be reached and where it is comparatively easy to administer with justice the law. Any other course seems to open wide the door to evasion of all taxation . .

"For these reasons no right secured to the plaintiffs by the Fourteenth Amendment to the Constitution of the United States or by our own Constitution is violated by the statute as thus interpretated. This conclusion is supported in principle by *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558 (and numerous other cases cited)".

The facts in the Welch case were substantially as follows: Plaintiffs sought to recover from the City of Boston amount of taxes paid under protest. The plaintiffs were trustees appointed by the Probate Court of York County in the State of Maine, under the will of a testatrix who was domiciled in that County and State. All the beneficiaries under the trust were domiciled in the State of California. The corpus of the trust fund, so far as concerned the tax in question, consisted of stocks and bonds of corporations foreign to the Commonwealth of Massachusetts. These bonds and certificates of stocks always were deposited and kept in the State of Maine. The question was whether such property was legally assessable to the plaintiffs who were domiciled in Massachusetts. It was held that the assessment under the statute was valid and that no right secured to the plaintiffs by the Fourteenth Amendment to the Constitution of the United States or by the Constitution of Massachusetts was violated by the Statute.

In *Safe Deposit & Trust Co. of Baltimore v. Commonwealth of Virginia*, 280 U. S. 83; 74 L. Ed. 180; 67 ALR 386 (annotation 390), it was stated that:

> "Ordinarily this court recognizes that the fiction of mobilia sequuntur personam may be applied in order to determine the situs of intangible personal property for taxation." *Blodgett v. Silberman*, 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. Rep. 410.

In *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558, the Court said:

> "So long as a State, by its laws prescribing the mode and subject of taxation, does not intrench upon the legitimate authority of the Union, or violate any right recognized or secured by the Constitution of the United States, this Court, as between the State and its citizen, can afford him no relief against state taxation, however unjust, oppressive or onerous".
>
> "This vital power," said this court in *Bk. v. Billings*, 4 Pet., 563, "may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State Governments. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation."

In *St. Louis v. Ferry Co.*, 11 Wall., 423, 20 L. Ed., 192, and in State Tax on Foreign Held Bonds, 15 Wall., 300, 21 L. Ed., 179, the language of the court was equally emphatic, viz:

> "unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction".

II. CONCLUSION

The Rhode Island statute follows the common rule in taxing the trust property to the trustee. In *Anthony v. Caswell* (1885) 15 R. I., 159, the court in construing substantially the same statute with which this court is now concerned had before it a set of facts which is almost exactly opposed to the present case. In the cited case the trustee rsided in New York and the cestui resided in Rhode Island. Residence in Rhode Island of the *cestui* was held *not* to confer authority to tax the trust fund to an out-of-state trustee. And the court stated:

> "The statute, *following the common rule* clearly recognizes executors, administrators and *trustees* as the owners, *for the purpose of taxation* of the property held in trust by them".

(1) Only one-half of the fund was taxed to the resident trustee.

The provision of the Rhode Island Statute providing for apportionment where there is more than one trustee was strictly followed by the appellees. Note also that the information upon which one-half of the securities forming the trust fund was taxed to the resident trustee came from his own representative (R. 27) and the assessment was made in accordance with the resident trustee's own feelings in the matter (R. 27).

The Massachusetts case (*Newcomb v. Paige*, 224 Mass. 516, Appellant's Brief, pp. 10, 12 and 19) is no authority for appellants because the Massachusetts statute does not correspond to the Rhode Island Statute, and further that decision was based upon the final sentence of Clause 5 of Section 23 of the Tax Act, viz:

> "The final sentence of the clause, to the effect that when the trustee is not a resident of this Commonwealth, the fund shall be assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to . . . trustee under a testamentary trust in any other state', is some indication of a legislative purpose that a trust fund lawfully within the taxing jurisdiction of another state and there making a just contribution to the support of government, should not be made liable to another tax here".

The Newport trustee because of his residence is entitled to all the protection the State of Rhode Island affords to the legal owner of property. That such residence is an ample basis for the imposition of the tax was upheld by the Supreme Court of Rhode Island as long ago as 1891 in *Ailman and Honey*, 17 R. I., 362.

Even though the Massachusetts tax statute in the case (*Newcomb v. Paige, supra*), contained a provision for apportionment, that statute differed from the Rhode Island statute, and the Massachusetts Court in construing its statute based its decision upon the legislative intent as found by the court, not to tax the trust fund, *if it involved double taxation* Nothing could be clearer, from the court's calling attention to the non-taxability of a *beneficiary* under clause 5 of Section 23 of the Massachusetts Tax Act where the trust fund was legally

taxable in another state, than that the court discovered a legislative intention *not* to tax to a Massachusetts co-trustee a portion of an out-of-state trust fund taxable elsewhere. In other words, the court found that the Massachusetts legislature had forbidden double taxation. This is the opposite of the finding of the Rhode Island Court on the Rhode Island statute in petition of *Ailman and Honey*, supra, where the Court construed the provision of the Rhode Island tax statute which is concerned in this case to apply to out-of-State trusts and said (p. 364):

> . . . . if it (the trust fund) be thus liable to double taxation, here and elsewhere, that has to do with the policy of the law, over which we have no control . . . . "

The well-settled construction of the statute is that it applied to a resident trustee of an out-of-state trust.

The law of Petition of *Ailman & Honey*, supra, has been the law of Rhode Island since 1891. Honey, a resident of Newport, Rhode Islar 1, was appointed by the South Carolina courts as trustee of a South Carolina trust estate constituted under the will of a South Carolina resident decedent. The beneficiary was a New York resident. Honey invested some of the trust fund in mortgages on Newport real estate. A tax was assessed to Honey upon the intangible property so held and the trustee raised the question that the statute should be construed as applying "only to property of decedent inhabitants of the State" (p. 364). The court decided that both the explicit language of the statute and its intent caused it to apply to a resident trustee of an out-of-state trust fund, and upheld the tax. In so construing the statute, the court stated unmistakably that the resi-

dence in this state of the legal owner of the intangibles was sufficient, *in and of itself*, to give a taxable situs within Rhode Island to the intangibles:

> " . . . In the case before us, the legal owner resides here, and he has invested a part of his trust estate here; so that the situs of the property is doubly fixed. The fact that the authority of the trustee comes from another state *does not change the fact of his residence and legal title within this state; nor the fact that the property taxed is here*, by reason of its investment in loans secured by mortgages within this state, which run to the trustee".

The Rhode Island Statute construed in the Ailman case was practically the same as the statute under consideration in the instant case.

(3) Subsection Fifth of Section 9, Chapter 30, of the General Laws of Rhode Island 1938 is constitutional under both the Rhode Island and Federal Constitutions.

(a) The statute follows the common rule in assessing the tax to the trustee.

> "In the absence of a statute, the law would look upon the trustee as the owner, and assess the property at his domicile. If there are two or more trustees residing in different places, the tax is divided, the trustees being treated as equal owners . . . "Perry on Trusts and Trustees, Seventh Ed., Vol. 1, Sec. 331, p. 575, citing, among others, Green v. Mumford, 4 R. I. 313".

(b) The statute taxes to a resident trustee of an

out-of-state trust only his proportionate part of the trust fund.

Although the Rhode Island statutes provide that trustees shall hold the trust property as joint tenants (Chapter 431, Section 1 of the 1938 General Laws), a division of that joint tenancy title for purposes of *taxation* is authorized by the said Subsection Fifth of Section 9, Chapter 30 of the 1938 General Laws. Contrary to the Pennsylvania statute construed in Dorrance's Estate (cited supra), our statute *does* direct that if there is more than one trustee, *only his proportionate part* of the trust fund shall be taxed to each one. This is a reasonable and equitable procedure. It would be unfair to tax to the resident trustee (or trustees) all the trust property where there is a non-resident trustee (or trustees). The statute here, too, follows the common rule. (See quotation, cited supra, from "Perry on Trusts").

(c) The right of more than one state to tax intangible property has been enunciated and reaffirmed by the latest decisions of this Court.

Certain it is that if an owner of intangible property extends his activities with respect to his intangibles so that states other than his domicile give some measure of protection or benefits to his property, he is not thereby relieved of taxation for it at his domicile. (See *Curry v. McCanless*, supra, at p. 367):

> " . . . whether we regard the right of a state to tax as founded on power over the object taxed . . . through dominion over tangibles or over persons whose relationships are the source of intangible rights; or on the benefit and protec-

tion conferred by the taxing sovereignty, or both, it is undeniable that *the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax*, and consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles".

(4) The State of Rhode Island extends to the resident trustee in the instant case benefits and protection accorded to any resident legal owner of intangible property.

The claim of appellants that the State of Rhode Island has no "jurisdiction to tax" because the resident trustee and the trust property receive no benefits or protection from the State of Rhode Island is difficult to understand. In the concurring opinion in *State Tax Commission of Utah v. Aldrich*, supra: (p. 183), it was said:

" . . . . that phrase (jurisdiction to tax) obscures rather than enlightens, *for it only states a result* and does not analyze the constitutional problem".

It is a legal conclusion only. The appellants purport to arrive at the decision that Rhode Island has no "jurisdiction to tax" by alleging that the resident trustee and the trust fund receive no benefits or protection from the state. But the resident trustee receives benefits and protection accorded *any resident, legal owner of intangible property*.

THE ASSESSMENT SHOULD BE SUSTAINED.

IT WAS NOT ILLEGAL NOR IN VIOLATION OF ARTICLE XIV OF THE AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND SHOULD BE AFFIRMED.

Respectfully submitted,

JOHN C. BURKE
Special Counsel

ALEXANDER G. TEITZ
City Solicitor

Attorneys for Tax Assessors of City of Newport

JOHN H. NOLAN
Attorney General of the State of Rhode Island

Attorney for Edward L. Leahy, Tax Administrator of the State of Rhode Island

Appellees

Newport, R. I.
January 21, 1947.

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Supreme Court, U. S.
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CHARLES ELMORE CROPLEY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 461

WILLIAM GREENOUGH AND
GEORGE HENRY WARREN, JR., Trustees,
Appellants

v.

TAX ASSESSORS of the City of Newport; and
EDWARD L. LEAHY, Tax Administrator of the State of Rhode Island,
Appellees

REPLY BRIEF FOR APPELLEES

JOHN C. BURKE
Special Counsel

ALEXANDER G. TEITZ
City Solicitor

Attorneys for Tax Assessors of City of Newport

JOHN H. NOLAN
Attorney General of the State of Rhode Island

Attorney for Edward L. Leahy, Tax Administrator of the State of Rhode Island
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REPLY BRIEF FOR APPELLEES

I

GENERAL RULE IS THAT ASSESSMENT SHOULD BE APPORTIONED ACCORDING TO RELATIVE NUMBER IN THE TAXING STATE.

In Cooley on Taxation, Fourth Edition, Sec. 469, it is said: "As the trustee holds the legal title of the trust property . . . it is generally held that the situs of personal property held by a trustee, for the

purposes of taxation is the state or district where the trustee is domiciled, and this includes intangible as well as tangible personal property"; and in Sec. 470 the author says: "If there are two or more trustees, and part of them reside in one state and part in another state, the general rule is that the assessment of the property should be apportioned among them according to the relative number in the taxing state".

In *Mackay and Day trustees v. City and County of San Francisco*, 128 Cal. 678 (1900), the court held that bonds of foreign railroads payable in the City of New York, which were the property of a deceased resident of California were taxable at the domicile of the trustees, and where only one of the trustees was a resident of that State, and the non-resident trustee had the bonds on deposit in the City of New York, in the joint names of both of the trustees, were taxable in California only as to the undivided half thereof legally owned by the resident trustee.

II

SITUS OF INTANGIBLE PROPERTY IS THAT OF THE RESIDENCE OF OWNER WHETHER LIVING IN THE STATE OR OUTSIDE THE STATE.

In *San Francisco v. Mackay*, 22 Fed. 602 (at P. 606) it is said: "'The situs of incorporeal, intangible personal property for purposes of taxation is that of the residence of the owner when living outside the state as well as when living within it . . . . . under the other view there would be one law to govern the rights of residents and another those of non-residents."

In *Hinckley v. County of San Diego*, 49 Cal. App. 668, it is said: "Intangible property is incapable of a situs separate from its owner".

III

CONSTITUTIONAL RESTRICTIONS ON POWER OF TAXATION MUST BE STRICTLY CONSTRUED AGAINST THE LIMITATION.

In *Delany v. Lawery*, 154 Pac., 2d 674, which was followed in *Hoyt v. Woody*, 154 Pac., 2d 680, the court stated: "Constitutional restrictions on power of the legislature in the field of taxation must be strictly construed against the limitation".

In *Maguire v. Trefry*, 253 U. S. 12, 64 L. Ed. 12: it was held that a state may, without denying due process of law, tax the income received by a resident from securities held for her benefit by the trustees, in a trust created and administered by the law of another state, and not directly taxable to the trustee.

IV.

IT IS PRESUMED THAT TAXPAYER RECEIVES A BENEFIT FROM THE TAX.

In *Browning v. Hooper*, 3 Fed. 2d 160 the Court said: "Benefit is presumed from a general tax for a public purpose. People without children pay a school tax that other children may go to school. People without means of locomotion pay a road tax that other people may ride on the road and on the street. Such taxes are part of civilization's toll."

In *State v. Donald*, 160 Wis., 21 (at P. 125) it is stated: "The basic idea of tax and justification for it, is that it involves an exchange of equivalents. The taxing power obtains the contribution to the treasury and the contributor, in return, receives a legal consideration of a potential nature to his person or property, or both. It is often difficult to appreciate just where the consideration comes in".

V

DOMICILE IS THE CONTROLLING CONSIDERATION.

In *Lawrence v. State Tax Com. of Mississippi*, 286 U. S., 276; 76 L. Ed. 1102, the court said: "The obligation of one domiciled within a State to pay taxes there arises from unilateral action of the State government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expense of government and to distribute its burdens equally among those who enjoy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the State, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility of sharing the costs of government" . . . . and cases cited.

In *Safe Deposit & T. Co. v. Virginia*, 280 U. S., 83 (Appellant's Brief pp. 9, 25, 26, 33) it was held that a Virginia assessment levied against a trustee domiciled in Maryland upon securities held by it in trust in its exclusive possession and control in Maryland was forbidden as an attempt to tax property without the jurisdiction.

In the annotation to the cited case in 67 ALR 408 in analyzing the cited case the following appears:

"In both the controlling opinion, delivered by Mr. Justice McReynolds, and a concurring opinion, delivered by Mr. Justice Stone, in *Safe Deposit & T. Co. v. Virginia*, it is stated that the question whether a state has the power to lay a tax upon the fair value of any interest in a trust fund in the possession of a trustee resident in another state, actually owned by one of her resident citizens, was not presented for consideration, but Mr. Justice Stone seems to express a personal opinion that the equitable interest of the cestui que trust may be taxed in the state of his residence".

In *Central Hanover Bank and Trust Co. v. Kelly*, 319 U. S. 94, 87 L. Ed., 1282 at p. 96, the court said:

"It is much too late to contend that domicile alone is insufficient to give the domiciliary state the constitutional power to tax a transfer of intangibles where the owner, though domiciled within the state, keeps the paper evidences of the intangibles outside its boundaries. See *Blackstone v. Miller*, 188 U. S. 189, 23 S. Ct., 277, 47 L. Ed., 439; *Blodgett v. Silberman*, 277 U. S. 1, 48 S. Ct., 410, 72 L. Ed. 749; *Curry v. McCanless*, 307 U. S., 357, 59 S. Ct., 900, 83 L. Ed., 1339, 123 A. L. R. 162 and cases cited. The command of the state over the owner, the obligations which domicile creates, the practical necessity of associating intangibles with the person of the owner at his domicile since they represent only rights which he may enforce against others — these are the foundation for the jurisdiction of the domiciliary state to tax (*Curry v. McCanless*, supra). We recently applied that principle to sustain, on facts very close to the present case, Oregon's power to tax a transfer of intangibles held in Illinois by one domiciled in

Oregon (*Pearson v. McGraw*, 308 U. S. 313). The execution of the present trust agreement in New York, the circumstances that the remaindermen as well as trustee were non-residents of the taxing state are quite immaterial. Domicile is the single controlling consideration in this situation, as it is in the case of the taxation of income derived from activities outside the state (*Lawrence v. State Tax Com.*, 286 U. S. 276, 279; *New York ex rel. v. Groves*, 300 U. S. 308)".

VI

CONCLUSION

The case of *Anthony v. Caswell*, 15 R. I., 159, cited on page 9 of appellants' brief has no application to this case because there the *trustee* was a *non-resident*. The court said on page 161 of 15 R. I.: "The statute, following the common rule, clearly recognizes executors, administrators, and trustees as the owners, for the purposes of taxation, of the property held in trust by them. And see *Greene v. Mumford*, 4 R. I., 313, 319. It is against them that the taxes are assessed, and no remedy is provided for the collection of taxes assessed against them, from resident *cestuis que trustent*. It will be noticed, too, that section 12 provides that when the *cestuis* are non-residents, the trustees shall nevertheless be taxed in the towns where they severally reside".

Newcomb v. Paige, 224 Mass., 516, cited on page 10 of Appellants' brief, the statute said: "if the trustee is not an inhabitant of the commonwealth", ... the whole theory of the decision is that the statute was to prevent double taxation and the court found a legislative purpose that the act should not apply to a non-

resident trustee. The court said the fund in another state should not be taxed where it is subject to taxation in the foreign state. The court did not say that if the legislative purpose was to so tax a fund in another state that such a tax would be unconstitutional.

The case of Dorrance's will cited on page 14 of appellants' brief — it appears on page 15 of the brief that there was no provision in the Pennsylvania statute "for dividing such trust property among resident and non-resident trustees for purposes of this tax". The question before this Court is not whether the Rhode Island statute by its terms applies to the facts of this case, but whether its application by the Tax Assessors was repugnant to the due process clause.

The case of *Blodgett v. Silberman*, 277 U. S. 1, cited at page 26 of appellants' brief — there the court felt that the principle of *mobilia sequuntur personam* "ought not to be applied if so to do would result in inescapable and patent injustice whether through double taxation or otherwise". In this case no claim of double taxation is made and no injustice could result where Rhode Island taxes only one-half the trust fund and New York taxes nothing.

The material from the middle of page 33 of appellants' brief to the end of the argument has no bearing on this case. The only question before this Court is whether a particular tax assessment on June 15, 1944, violates the due process clause. It makes no difference whether the State of Rhode Island can or cannot collect the tax assessed by an action in New York or in any other manner. As a matter of fact, the trustees paid this particular assessment under protest, and the action is a petition to recover back the tax paid. Furthermore, the constitu-

tionality of this particular assessment is in no way affected by the fact that George Henry Warren, Jr., might resign as trustee or change his residence from Newport or become disqualified to act as trustee. The only question for this Court is whether, when an assessment was made against George Henry Warren, Jr., trustee, as a resident, under the terms of the Rhode Island statute, such assessment was constitutional. If the beneficiary of the trust should die, the fund would be, by the terms of the will, payable to the remaindermen, and Rhode Island would not be able to levy any further tax. However, that would in no way affect the validity of the particular assessment involved.

On page 3 of appellants brief, the statement is made that "the undisputed facts are contained in the petition filed in the Superior Court of the County of Newport, Rhode Island, by the appellants herein (R. I-5), and are as follows: . . . . " and on page 6 of appellants' brief it is stated:

> "4. That the trustees of said trust fund hold said trust fund, so located in the State of New York, as joint tenants, and their title and interest in said fund as such joint tenants are not severable or divisible for the purposes of taxes or otherwise, and their powers must be exercised as a unit . . . "

And also stated on page 6:

> "5. That George Henry Warren, Jr., as an individual resident in Rhode Island, does not, as trustee, exercise his powers as trustee in Rhode Island, nor does he, as trustee, enjoy any benefits or protection from the laws of Rhode Island".

The appellees earnestly assert that it is not undisputed that the title and interest of the trustees in the trust fund located in New York are not severable or divisible for

the purpose of taxation, nor is it undisputed that George Henry Warren, Jr., does not as trustee enjoy benefit or protection from the laws of Rhode Island. These are the very contentions upon which appellants seek to reverse the judgment of the Superior Court of Rhode Island. The opinion of the Rhode Island Supreme Court contained a considerable discussion as to whether George Henry Warren, Jr., as trustee would or might enjoy benefit or protection from the laws of Rhode Island. (R. 47-49).

Respectfully submitted,

JOHN C. BURKE
Special Counsel

ALEXANDER G. TEITZ
City Solicitor

Attorneys for Tax Assessors of City of Newport

JOHN H. NOLAN
Attorney General of the State of Rhode Island

Attorney for Edward L. Leahy, Tax Administrator of the State of Rhode Island

Appellees

Newport, R. I.
February, 1947

SUPREME COURT OF THE UNITED STATES

No. 461.—October Term, 1946.

William Greenough and George Henry Warren, Jr., Trustees, Appellants, *v.* Tax Assessors of the City of Newport; and Edward L. Leahy, Tax Administrator of the State of Rhode Island.	Appeal from the Superior Court of the County of Newport, State of Rhode Island.

[June 9, 1947.]

Mr. Justice Reed delivered the opinion of the Court.

Appellants are testamentary trustees of George H. Warren, who died a resident of New York. His will was duly probated in that state and letters testamentary issued to appellants as executors. A duly authenticated copy of said will was filed and recorded in Rhode Island and there letters testamentary were also issued. Letters of trusteeship were granted to appellants by a surrogate's court in New York. None were needed or asked for or granted by Rhode Island. At all times pertinent to this appeal, appellants, as trustees under the will, held intangible personalty for the benefit of Constance W. Warren for her life and then to certain as yet undetermined future beneficiaries.

The evidences of the intangible property in the estate of George H. Warren and in the trust in question were at all times in New York. The life beneficiary and one of the trustees are residents of New York. The other trustee resides in Rhode Island. During the period in question, he did not, however, exercise his powers, as trustee, in Rhode Island.

A personal property tax of $50 was assessed by the City of Newport, Rhode Island, against the resident trustee upon one-half of the value of the corpus of the trust. The applicable assessment statute for *ad valorem* taxes appears

in the margin.[1] At the time of this assessment, the property consisted of 500 shares of the capital stock of Standard Oil Company of New Jersey. The tax was paid by the trustees and this suit instituted, under appropriate state procedure, in the Superior Court of the County of Newport to recover the tax from the city. The Superior Court by decision denied the petition. A bill of exceptions was prosecuted by these petitioners to the Supreme Court of Rhode Island which overruled the exceptions and remitted the case to the superior court.[2] Thereupon judgment was entered for the appellees and an appeal allowed to this Court. All questions of state procedure and of the applicability of the state statute to the resident trustee in the circumstances of this case were foreclosed for us by the rulings of the Supreme Court of Rhode Island.[3]

The appellants' contention throughout has been that the Rhode Island statute, under which the assessment was made, if applicable to the resident trustee, was unconstitutional under the due process clause of the Fourteenth Amendment to the Constitution of the United States. Their objection in the state courts and here is that Rhode

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[1] General Laws of Rhode Island (1938), c. 30, § 9:

"*Fifth.* Intangible personal property held in trust by any executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator, or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee resides; and if there be more than one such executor, administrator, or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

[2] General Laws of Rhode Island (1938), c. 31, § 14; c. 545, § 6, as amended by c. 941, Public Laws of Rhode Island (1939–40); *Greenough* v. *Tax Assessors*, 71 R. I. 477.

[3] *Chase Securities Corporation* v. *Donaldson*, 325 U. S. 304, 311; see *Huddleston* v. *Dwyer*, 322 U. S. 232, 237; *American Federation of Labor* v. *Watson*, 327 U. S. 582, 595.

Island cannot tax the resident trustee's proportionate part of these trust intangibles merely because that trustee resides in Rhode Island. Such a tax, they urge, is unconstitutional under the due process clause because it exacts payment measured by the value of property wholly beyond the reach of Rhode Island's power and to which that state does not give protection or benefit. Appellants specifically disclaim reliance upon the argument that the Rhode Island tax exposes them to the danger of other *ad valorem* taxes in another state.[4] The same concession was made in the Supreme Court of Rhode Island.[5] We therefore restrict our discussion and determination to the issue presented by appellants' insistence that Rhode Island cannot constitutionally collect this tax because the state rendered no equivalent for its exaction in protection of or benefit to the trust fund.

For the purpose of the taxation of those resident within her borders, Rhode Island has sovereign power unembarrassed by any restriction except those that emerge from the Constitution. Whether that power is exercised wisely or unwisely is the problem of each state. It may well be that sound fiscal policy would be promoted by a tax upon trust intangibles levied only by the state that is the seat of a testamentary trust.[6] Or, it may be that the actual domicile of the trustee should be preferred for a single tax. Utilization by the states of modern reciprocal statutory tax provisions may more fairly distribute tax benefits and

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[4] See McKinney's Consolidated Laws of New York, Tax Law, §§ 3, 350 (7), 365, 369, 377. *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54. Compare *Blackstone* v. *Miller*, 188 U. S. 189; *Curry* v. *McCanless*, 307 U. S. 357, 363; *Graves* v. *Elliott*, 307 U. S. 383; *Graves* v. *Schmidlapp*, 315 U. S. 657; *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174, 177, with *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *First National Bank* v. *Maine*, 284 U. S. 312.

[5] *Greenough* v. *Tax Assessors*, 71 R. I. 477, 488.

[6] Compare *Harrison* v. *Commissioner of Corporations and Taxation*, 272 Mass. 422.

burdens, although the danger of competitive inducements for obtaining a settlor's favor are obvious.[7] But our question here is whether or not a provision of the Constitution forbids this tax. Neither the expediency of the levy nor its economic effect on the economy of the taxing state is for our consideration.[8] We are dealing with the totality of a state's authority in the exercise of its revenue raising powers.

The Fourteenth Amendment has been held to place a limit on a state's power to lay an *ad valorem* tax on its residents.[9] Previous decisions of this Court have held that mere power over a resident does not permit a state to exact from him a property tax on his tangible property permanently located outside the jurisdiction of the taxing state.[10] Such an exaction, the cases teach, would violate the due process clause of the Fourteenth Amendment, because no benefit or protection adequate to support a tax exaction, is furnished by the state of residence.[11] The domiciliary state of the owner of tangibles permanently located in another state, however, may require its resident to contribute

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[7] Compare Mr. Justice Holmes' dissent, *Baldwin* v. *Missouri*, 281 U. S. 586.

[8] *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174, 181.

[9] See *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 279. Art. I, § 10, cl. 2 and 3, contain limitations on a state's power to levy import or export or tonnage duties.

[10] *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 202; *Frick* v. *Pennsylvania*, 268 U. S. 473, 488; *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325, 328–29; *Curry* v. *McCanless*, 307 U. S. 357, 363–65, and note 3; see *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444; *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174, 178.

[11] Even where our cases have spoken of power over the person as though it alone might be a sufficient justification for *ad valorem* taxation of a resident on tangibles outside the taxing jurisdiction, the language was used in instances where there were other bases for the tax. *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319; *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 76; *Pearson* v. *McGraw*, 308 U. S. 313, 318.

to the government under which he lives by an income tax in which the income from the out-of-state property is an item of the taxpayer's gross income. It is immaterial, in such a case, that the property producing the income is located in another state. *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308. And where the tangible property of a corporation has no taxable situs outside the domiciliary state, that state may tax the tangibles because the corporation exists under the law of its domicile. *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63.[12]

The precedents, holding it unconstitutional for a state to tax tangibles of a resident that are permanently beyond its boundaries, have not been applied to intangibles where the documents of owner interest are beyond the confines of the taxing jurisdiction or where the choses in action are mere promises of a nonresident without documents.[13] One reason that state taxation of a resident on his intangibles is justified is that when the taxpayer's wealth is represented by intangibles, the tax gatherer has difficulty in locating them and there is uncertainty as to which taxing district affords benefits or protection to the actual property that the intangibles represent. There may be no "papers." If the assessment is not made at the residence of the owner, intangibles may be overlooked easily by other assessors of taxes. A state is dependent upon its citizens for revenue. Wealth has long been accepted as a fair measure of a tax assessment. As a practical mode of collecting revenue, the states unrestricted by the federal Constitution have been accustomed to assess property taxes upon intangibles "wherever held

[12] See discussion in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292.

[13] *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54; compare *Blodgett* v. *Silberman*, 277 U. S. 1, 8–12; *Maguire* v. *Trefry*, 253 U. S. 12; *Curry* v. *McCanless*, 307 U. S. 357, 365–68; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444; *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174, 180.

or deposited," belonging to their citizens and regardless of the location of the debtor.[14] So long as a state chooses to tax the value of intangibles as a part of a taxpayer's wealth, the location of the evidences of ownership is immaterial. If the location of the documents was controlling, their transfer to another jurisdiction would defeat the tax of the domiciliary state. As a matter of fact, there is more reason for the domiciliary state of the owner of the intangibles than for any other taxing jurisdiction to collect a property tax on the intangibles. Since the intangibles themselves have no real situs, the domicile of the owner is the nearest approximation, although other taxing jurisdictions may also have power to tax the same intangibles.[15] Normally the intangibles are subject to the immediate control of the owner. This close relationship between the intangibles and the owner furnishes an adequate basis for the tax on the owner by the state of his residence as against any attack for violation of the Fourteenth Amendment. The state of the owner's residence supplies the owner with the benefits and protection inherent in the existence of an organized government. He may choose to expand his activities beyond its borders but the state of his residence is his base of operations. It is the place where he exercises certain privileges of citizenship and enjoys the protection of his domiciliary government. Does a similar relationship exist between a trustee and the intangibles of a trust?

The trustee of today moves freely from state to state. The settlor's residence may be one state, the seat of a trust another state and the trustee or trustees may live in still

[14] *Kirtland* v. *Hotchkiss*, 100 U. S. 491. Compare *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308.

[15] See *Curry* v. *McCanless*, 307 U. S. 357, 365–68; *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193. Certain evidences of indebtedness have been held sufficient in themselves to justify a state's imposition of a succession tax upon their nonresident owner. *Wheeler* v. *New York*, 233 U. S. 434

another jurisdiction or may constantly change their residence.[16] The official life of a trustee is, of course, different from his personal. A trust, this Court has said, is "an abstraction." In federal income tax purposes it is sometimes dealt with as though it had a separate existence. *Anderson* v. *Wilson*, 289 U. S. 20, 27. This is because Congress has seen fit so to deal with the trust. This entity, the trust, from another point of view consists of separate interests, the equitable interest in the *res* of the beneficiary[17] and the legal interest of the trustee. The legal interest of the trustee in the *res* is a distinct right. It enables a settlor to protect his beneficiaries from the burdens of ownership, while the beneficiary retained the right, through equity, to compel the legal owner to act in accordance with his trust obligations. The trustee as the owner of this legal interest in the *res* may incur obligations in the administration of the trust enforceable against him, personally.[18] Nothing else appearing, the trustee is personally liable at law for contracts for the trust.[19] This is

[16] See *Hutchison* v. *Ross*, 262 N. Y. 381, 393.

[17] *Brown* v. *Fletcher*, 235 U. S. 589, 598-600; *Blair* v. *Commissioner*, 300 U. S. 5, 13.

[18] Scott, Trusts (1939), 487, 1400 *et seq.*; Williston, Contracts (1936) § 312; Bogert, Trusts and Trustees (1935) § 146.

[19] *Duvall* v. *Craig*, 2 Wheat. 45, 56; *Taylor* v. *Davis*, 110 U. S. 330, 335: "A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such."

Lazenby v. *Codman*, 28 F. Supp. 949; *Prudential Ins. Co.* v. *Land Estates*, 31 F. Supp. 845; *Peyser* v. *American Security & Trust Co.*, 107 F. 2d 625.

the rule in Rhode Island.[20] Specific performance may be decreed against him.[21] Of course, the trustee when acting within his powers for the trust is entitled to exoneration or reimbursement [22] and the trust *res* may be pursued in equity by the creditor for payment.[23]

The Supreme Court of Rhode Island considered the argument that the laws of the state afforded no benefit or protection to the resident trustee. Although nothing appeared as to any specific benefit or protection which the trustee had actually received, it concluded that the state was "ready, willing and capable" of furnishing either "if requested." A resident trustee of a foreign trust would be entitled to the same advantages from Rhode Island laws as would any natural person there resident. *Greenough* v. *Tax Assessors, supra,* 488. There may be matters of trust administration which can be litigated only in the courts of the state that is the seat of the trust. For example, in the case of a testamentary trust, the appointment of trustees, settlement, termination and distribution under the provisions of the trust are to be carried out, normally, in the courts of decedent's domicile. See *Harrison* v. *Comm'n of Corporations,* 272 Mass. 422, 427. But when testamentary trustees reside outside of the jurisdiction of the courts of the state of the seat of the trust, third parties dealing with the trustee on trust matters or beneficiaries may need to proceed directly against the trustee as an individual for matters arising out of his relation to the trust. Or the resident trustee may need the benefit of the Rhode Island law to enforce trust claims against a Rhode Island resident. As the trustee

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[20] *Roger Williams N. Bk.* v. *Groton Manufacturing Co.,* 16 R. I. 504.

[21] *Warren* v. *Goodloe's,* 230 Ky. 514, 520.

[22] Scott, Trusts, § 244 *et seq.* and § 258

[23] Scott, Trusts, § 267 *et seq.* See *Ballentine* v. *Eaton,* 297 Mass. 389; *O'Brien* v. *Jackson,* 167 N. Y. 31.

is a citizen of Rhode Island, the federal courts would not be open to the trustee for such causes of action where the federal jurisdiction depended upon diversity. The citizenship of the trustee and not the seat of the trust or the residence of the beneficiary is the controlling factor.[24] The trustee is suable like any other obligor. There is no provision of the federal Constitution which forbids suits in state courts against a resident trustee of a trust created under the laws of a sister state. Consequently, we must conclude that Rhode Island does offer benefit and protection through its law to the resident trustee as the owner of intangibles. And, while it may logically be urged that these benefits and protection are no more than is offered a resident owner of land or chattels, permanently out of the state, the same reasons, hereinbefore stated on pages 5 and 6, apply that permit state property taxation of a resident owner of intangibles while denying a state power to tax similarly the resident's out-of-state realty.

No precedent from this Court called to our attention indicates that the federal Constitution contains provisions that forbid taxation by a state of intangibles in the hands of a resident testamentary trustee. In *Brooke* v. *Norfolk*, 277 U. S. 27, the state property tax there invalidated, evidently as violative of the Fourteenth Amendment, was assessed to a life beneficiary, on a *res*, composed of intangibles, when both the testator and the trustee were residents of another state where the trust was administered. *Safe Deposit and Trust Company* v. *Virginia*, 280 U. S. 83, held invalid a state's tax on a trust's intangibles, actually in the hands of the nonresident trustee and not subject to the control of the equitable owner, because it was an attempt to tax the trust *res*, intangibles actually in the

[24] *Bullard* v. *Cisco*, 290 U. S. 179, 190. See *Memphis Street R. Co.* v. *Moore*, 243 U. S. 299.

hands of a nonresident trustee. This was said to conflict with the Fourteenth Amendment as a tax on a thing beyond the jurisdiction of the taxing state.[25] See also *Graves* v. *Schmidlapp*, 315 U. S. 657, 663, where the sovereign power of taxation was held to extend to a state resident who by will disposed of intangibles held by him as trustee with power of testamentary disposition under a nonresident trust. Nothing in these cases leads to the conclusion that a state may not tax intangibles in the hands of a resident trustee of an out-of-state trust.[26]

State courts construe their statutes according to their understanding of state policy and apply them to such situations as their interpretation of the statutory language requires. In so adjudging, they are the final judicial authority upon the meaning of their state law. It is only in circumstances where their judgments collide with rights secured by the federal Constitution that we have power to protect or enforce the federal rights. In adjudging the taxability under state law of a resident trustee's ownership of intangibles, without reliance upon the residence of settlor or beneficiary or the location of the intangibles, various conclusions have been reached under state law and without regard to the Constitution of the United States. They are pertinent to our problem only as illustrations of the different viewpoints of state law.[27]

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[25] The power of a state to tax the equitable interest of a beneficiary in such circumstances was not presented. *Id.*, pp. 92 and 95.

[26] *Goodsite* v. *Lane* (C. C. A. 6th), 139 F. 593, holds that a state property tax on a trustee's intangibles for the sole reason that he resides in the taxing state is invalid. It would seem this was so decided because of the Fourteenth Amendment. We do not think this case gives proper recognition to the state's power to tax the owner of the legal title to the res.

[27] The state statute taxing property to trustee validly applies to the resident trustee: *Welch* v. *City of Boston*, 221 Mass. 155; *Harvard Trust Co.* v. *Commissioner of Taxation*, 284 Mass. 225, 230; *Mackay* v.

Nor do we think it constitutionally significant that the Rhode Island trustee is not the sole trustee of the New York trust. The assessment, as the statute in question required, was only upon his proportionate interest, as a trustee, in the *res*. Whatever may have been the character of his title to the intangibles [28] or the limitations on his sole administrative power over the trust,[29] the resident trustee was the possessor of an interest in the intangibles, sufficient, as we have explained, to support a proportional tax for the benefit and protection afforded to that interest by Rhode Island.[30]

Affirmed.

San Francisco, 128 Cal. 678; *Millsaps* v. *Jackson*, 78 Miss. 537; *McLellan* v. *Concord*, 78 N. H. 89; *Florida* v. *Beardsley*, 77 Fla. 803.

The state tax statute is inapplicable to the resident trustee: *Dorrance's Estate*, 333 Penn. 162; *Commonwealth* v. *Peebles*, 134 Ky. 121, 135; *Darrow* v. *Coleman*, 119 N. Y. 137; *Rand* v. *Pittsfield*, 70 N. H. 530. *Newcomb* v. *Paige*, 224 Mass. 516, and *Harrison* v. *Commissioner*, 272 Mass. 422, declined taxation on the ground of comity and thus distinguished *Welch* v. *City of Boston*, *supra*, 272 Mass. 428–29.

[28] Scott, Trusts, §§ 88.1, 103; Bogert, Trusts and Trustees, § 145.

[29] Scott, Trusts, § 194; *Brennan* v. *Willson*, 71 N. Y. 502; *Fritz* v. *City Trust Co.*, 76 N. Y. S. 625, aff. 173 N. Y. 622; *In re Campbell's Estate*, 13 N. Y. S. 2d 773.

[30] The state courts have reached varying conclusions under their statutes: See *People ex rel. Beaman* v. *Feitner*, 168 N. Y. 360; *Mackay* v. *San Francisco*, 128 Cal. 678; *McLellan* v. *Concord*, 78 N. H. 89; *Dorrance's Estate*, 333 Penn. 162; *Newcomb* v. *Paige*, 224 Mass. 516; *Harrison* v. *Commissioner*, 272 Mass. 422, 430–31.

SUPREME COURT OF THE UNITED STATES

No. 461.—October Term, 1946.

William Greenough and George Henry Warren, Jr., Trustees, Appellants, v. Tax Assessors of the City of Newport; and Edward L. Leahy, Tax Administrator of the State of Rhode Island.	Appeal from the Superior Court of the County of Newport, State of Rhode Island.

[June 9, 1947.]

Mr. Justice Frankfurter, concurring.

In view of the dissents elicited by the Court's opinion, I should like to state why I join it.

Rhode Island taxes its permanent residents in proportion to the value of their property. The State imposes the tax whether its residents own property outright or own it, legally speaking, in a fiduciary capacity. It is not questioned that the intangible assets in controversy could be included in the measure of the tax against the person of this trustee if he owned them outright. The doctrine that the power of taxation does not extend to chattels permanently situated outside a State though the owner was within it, *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194; *Frick* v. *Pennsylvania*, 268 U. S. 473, is inapplicable. The tax is challenged, as wanting in "due process," because the Rhode Island resident is merely trustee of these intangibles and the pieces of paper that evidence them are kept outside the State.

Rhode Island's system of taxing its residents—subjecting them to the same measure for ascertaining their ability to pay whether they hold property for themselves or for others——long antedated the Fourteenth Amendment. Rhode Island has imposed this tax, "it may be presumed, for the general advantages of living within the jurisdiction." *Fidelity & Columbia Trust Co.* v. *Louisville*, 245

U. S. 54, 58. It can hardly be deemed irrational to say, as Rhode Island apparently has said for a hundred years, that those advantages may be roughly measured, for fiscal purposes, by the wealth which a person controls, whatever his ultimate beneficial interest in the property. "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike." *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31.

In any event, Rhode Island could in terms tax its residents for acting as trustees, and determine the amount of the tax as though a trustee owned his trust estate outright. Rhode Island has, in effect, done so by treating all Rhode Island residents alike in relation to their property holdings, regardless of their beneficial interests. That is the practical operation of the statute. It is that which controls constitutionality, and not the form in which a State has cast a tax. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 280; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443 *et seq.* Whether a Rhode Island trustee can go against his trust estate for the amount of the tax which Rhode Island exacts from him is of no concern to Rhode Island. Rhode Island's power to tax its residents is not contingent upon it. A trusteeship is a free undertaking.

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[June 9, 1947.]

Mr. Justice Jackson, dissenting.

If Rhode Island had laid a tax on one of its citizens individually, I should think it unassailable even if the basis for taxing him was that he held this trusteeship, and perhaps the tax on him could be measured by the value of the trust estate. In that case the state would tax only its own citizen. One is pretty much at the mercy of his own state as to the events of relationship for which it will tax him. If it wants to make the holding of a trusteeship taxable, I know of no federal grounds of objection. But that is not what is being done, nor what this decision authorizes.

If Rhode Island had taxed the individual, he might have sought reimbursement from the estate. Whether the estate was chargeable would be left to determination by the courts of the state supervising the trust. They might consider the nature of the tax to be a personal charge, as an income tax would doubtless be. Or they might find it to be an expense of administration, such as a transfer tax, and properly to be borne by the fund. But here no such decision is left to the courts which control the fund—the tax is laid on the trustee as such—the estate is the taxpayer.

Rhode Island claims the power to tax the estate solely because one of its trustees resides in that state. No prop-

erty is in Rhode Island and its courts are not supervising administration of the trust. The estate is wholly located in New York and the trustees derive their authority, powers and title from its courts and to them must account.

I had not supposed that a trust fund became taxable in every state in which one of its trustees may reside. Of course, in this instance it is proposed to tax only one-half of the estate as only one of the two trustees is resident in Rhode Island. But this seems to be an act of grace if there is a right to tax at all. The trustee has no power over, or title to, any fraction of the trust property that he does not have over all of it. If mere residence of a trustee is such a conductor of state authority that through him it reaches the estate, I see no reason why it should stop at a part, nor indeed why a trustee subject to the taxing power of several states, *Cf. Texas* v. *Florida*, 306 U. S. 398, may not also subject the trust fund to several state taxes by merely moving about.

The decision is a hard blow to the practice of naming individual trustees. It seems to me that there is no power in the state to lay the tax on the trust funds, despite unquestionable authority to tax its own citizen-trustee individually.

MR. JUSTICE MURPHY joins in this opinion.

SUPREME COURT OF THE UNITED STATES

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[June 9, 1947.]

Mr. Justice Rutledge with whom The Chief Justice concurs, dissenting.

I am in agreement with the views expressed by Mr. Justice Jackson, except that I intimate no opinion concerning whether Rhode Island could lay a tax upon one of its residents for the privilege of acting as one of two or more trustees, when the state's only connection with the trust arises from the fact of his residence. This is not such a case.

Whether or not due process under the Fourteenth Amendment forbids state taxation of acts, transactions, events or property is essentially a practical matter and one of degree, depending upon the existence of sufficient factual connections, having economic and legal effects, between the taxing state and the subject of the tax. I do not think the mere fact that one of a number of trustees resides in a state, without more, is a sufficiently substantial connection to justify a levy by that state upon the trust corpus, by an *ad valorem* tax either fractional or on the entirety of the *res*.

It may become necessary for claimants, beneficiaries or others to sue the trustee in Rhode Island or perhaps for him to join with other trustees in suing third persons there about trust matters. To that extent benefit and protection may be conferred upon the trust. But those

needs may arise in connection with any sort of business or activity, trust or other, located and conducted outside the state as largely as this trust's affairs. I had not supposed that merely keeping open the state's courts to such claims would furnish a sufficient basis for bringing within its taxing grasp all property affected by the claims' assertion. That the trust *res* here consists of intangibles does not seem to me a sufficiently substantial factor, in the circumstances presented, to justify so wide a reach of the state's taxing arm.

Mobilia sequuntur personam has its appropriate uses for sustaining the states' taxing powers affecting residents and their extrastate interests. But when it is applied to the split ownership of a trust, not only as between trustee and beneficiary but also as among several trustees, to bring the trust *res* within the several states' powers of taxation, merely by virtue of the residence in each of one trustee and nothing more, the fiction I think is carried too far. Something more than affording a domiciliary basis for service of process, coupled with the split and qualified representative ownership of such a trustee, should be required to sustain the state's power to tax the trust *res*, whether for all or only a fraction of its value.

Finally, whatever might be true of a single trustee or of several residing in a single state, I should doubt the thesis that the interest of one of two or more trustees in a trust is more substantial than that of a beneficiary or receives greater protection or benefit from the state of his residence. And if the beneficiary's residence alone is insufficient to sustain a state's power to tax the corpus of the trust, cf. *Brooke* v. *Norfolk*, 277 U. S. 27,[1] it would seem that the mere residence of one of a number of trustees hardly would supply a firmer foundation.

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[1] But cf. Holmes, J., dissenting in *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83, 96.